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## ARTICLES

### LEX AMERICANA?: UNITED STATES LEGAL ASSISTANCE, AMERICAN LEGAL MODELS, AND LEGAL CHANGE IN THE POST-COMMUNIST WORLD AND BEYOND

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#### 1. INTRODUCTION

Asked to provide advice to a Central or Eastern European nation drafting its first post-socialist constitution, a prominent American legal academic promptly produces an elaborate manuscript headed "Constitution of the Republic of \_\_\_\_\_." The document is a form-book charter of economic liberties, liberal rights, democratic governance, and limited governmental powers that awaits only a few strokes of the pen to insert the recipient

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script headed "Constitution of the Republic of \_\_\_\_\_." The document is a form-book charter of economic liberties, liberal rights, democratic governance, and limited governmental powers that awaits only a few strokes of the pen to insert the recipient country's name.<sup>1</sup> Half a world away, a young Mongolian official gratefully accepts a stack of documents detailing United States securities laws from American experts who are in Ulan Batar on a short visit. He asks the members of the delegation to send him more such materials, also photocopied on one side of the page, after they return home. When the group departs, the Mongolian explains (to another American advisor) that the texts are, of course, of little use in his efforts to craft laws for his country's infant equities markets, but that the blank side of the pages will help to alleviate his office's chronic shortage of quality paper.<sup>2</sup>

These two episodes lie at the unhappy end of a spectrum of contemporary United States efforts to export legal models and provide legal assistance around the world. They represent only very small, and strikingly ineffective, parts of the extraordinarily ambitious and multifaceted drive undertaken or supported by U.S. organizations and individuals to transplant laws and legal ideas and to foster legal reform or development abroad. Although in some respects atypical, the anecdotes from Mongolia and the new European republic point to several basic features of the recent career of U.S. legal assistance and export efforts.

Both stories reflect common contexts that have framed diverse efforts to promote U.S. legal models and provide U.S. legal assistance during the last decade or more. During this period, two developments have accorded the United States a new and uniquely important role in international processes of legal change. First, there has been a "globalization" of economic activity that has taken markets and, to a degree, international openness as its or-

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<sup>1</sup> See Symposium, *Constitutional "Refolution" in the Ex-Communist World: The Rule of Law*, September 26, 1996, 12 AM. U. J. INT'L L. & POL'Y 45, 118-19 (1997) (providing the remarks of Central and Eastern European Law Initiative ("CEELI") Executive Director Mark Ellis); cf. BERNARD H. SIEGAN, *DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM*, app. I (2d ed. 1994) (setting forth a model constitution for a post-authoritarian republic).

<sup>2</sup> See William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT'L L. & POL'Y 437, 438 (1996) (relating the anecdote) [hereinafter Kovacic, *Competition Policy Entrepreneur*].

ganizing principles. Second, the crumbling of state socialism has precipitated a world-wide wave of democratization. These transformations have produced a seemingly insatiable appetite for legal and constitutional reforms suited to the new political and economic orders. The opening of new areas (both geographic and substantive) to American influence, the removal of the principal rivals to U.S. power and American-supported ideologies, and the seemingly sweeping embrace of principles that official and unofficial U.S. actors have seen as congenial (or even as proprietarily American) thus have provided the setting for countless U.S. legal export-promotion and advice-offering activities that have sought to respond to the demands and opportunities of the era.

Large or small, successful or embarrassing, such programs and projects almost all have pursued one or more elements of an agenda that has included building multi-party electoral democracy, a generally liberal rule of law supported by an independent judiciary and bar, and a legal framework for a market-oriented economy that is generally receptive to international trade and foreign investment. Many of the efforts that have focused on the economic aspects of this agenda have seen market-friendly legal changes as harbingers of—or as dependent upon—changes in more “political” aspects of law. A similar sense of interconnectedness of aims has characterized many attempts to foster changes in constitutional structure, civil liberties laws, and the like.

As the great distance and obvious differences between Ulan Batar and the post-socialist European capital underscore, the scope of such undertakings has been truly global, with major programs—as well as more discrete and less formal activities—targeting every region of the world except Western Europe, North America, and the most economically advanced nations of East Asia.

The U.S. securities law specialists’ junket to Mongolia (where another American consultant was present during the copying paper incident and later recounted the tale when arguing for a much less “prescriptive” approach to providing U.S. legal assistance) and the American law professor’s offer of “remote” constitutional advice (which passed to the new leaders of a European state via an intermediary who himself had been a significant participant in more sustained and structured American programs of legal advice to post-Soviet states) also provide glimpses of the diversity of channels for legal export and assistance. These anecdotes also un-

derscore the complicated relationships among U.S. participants in those processes, and the difficulty of defining what counts as a "U.S." legal export or "U.S." assistance. Even more than these Central Asian and Central/Eastern European "snapshots" suggest, the connections among U.S. funders and providers (and their relationships with foreign rivals, collaborators and counterparts) have been highly varied and complex. By some standards, many aid and advice projects run or joined by American organizations and individuals might not count as offering "U.S." models or "U.S." views or "U.S." programs. On the other hand, formal or purposive "programs" or "projects" offering "advice" also have not been the only significant media through which Americans and others have been transmitting U.S. legal rules and ideals abroad.

As the ill-fated pair of ventures at opposite fringes of the former socialist world illustrate, recent U.S. efforts to influence or implant laws or elements of legal systems abroad have focused as never before on the two regions where globalization and "marketization" in the economic realm and democratization and "constitutionalization" in the political realm have had perhaps their most striking impacts, if not always their best results: (1) Central and Eastern Europe ("CEE") and the Newly Independent States ("NIS") of the former Soviet Union, and (2) the People's Republic of China ("P.R.C.") and other reforming socialist or authoritarian states in its region. As the subject matter of the advice offered to the Mongolian law reformer and the CEE nation's constitution-drafters also reflect, formal U.S. programs and less institutionalized projects have addressed an extremely wide range of legal issues related to the broad themes of markets, democratization, and the rule of law. These legal subjects have ranged from questions of economic regulation, to technical training for the makers and implementers of laws to constitutional and quasi-constitutional issues of government structures and individual rights, to the reform of legal education and the promotion of judges' and lawyers' voluntary organizations.

The anecdotes from Mongolia and the unnamed European republic also depict one point on a very wide continuum of types of U.S. advisors and processes for offering U.S. advice. The two stories describe strikingly uninstitutionalized participants who have little knowledge of the recipient countries and who offer highly detailed prescriptions in a "one-off" mode of providing advice.



Other programs and projects for exporting U.S. models and extending U.S. legal assistance have been fundamentally different in some or all of these respects. The forms and providers have been as heterogeneous as the efforts' substantive legal foci.

The Mongolian and CEE vignettes also remind us that apparently promising opportunities may still leave U.S. purveyors of advice and disseminators of U.S. models without a recipe for crafting effective and appropriate content or delivery mechanisms for legal exports and assistance. On the whole, the impact of U.S. programs and projects and the influence of U.S. models have been uneven and relatively modest in their key target areas of the former Soviet Bloc and the P.R.C. and its region. Although the obvious and abject failures of the U.S. advice efforts reflected in the Mongolian's quest for blank paper and in the unhappy fate that awaited the fill-in-the-blank constitution have not been ubiquitous, many seeming successes have been illusory or may prove to be so over time or upon closer inspection. On the other hand, and contrary to what the report from Ulan Batar and the case of the off-the-rack constitution suggest, some significant effects of U.S. legal aid and U.S. legal ideas may not yet be fully visible and may remain hard to discern (in part because of the controversies that inevitably attend attempts to define what counts as "successful" advice or exportation).

The diversity of agendas and methods and the complex recipient-country contexts of the current drives to extend U.S. legal aid and export U.S. legal models, together with the recent origin and still-unfolding story of such undertakings, make it impossible to offer firm and confident empirical generalizations about success and failure. The impact of U.S. legal export and assistance efforts has varied greatly—but not in any simple way—with the form, scale, and methods of programs and projects, the substantive subjects they have addressed, and circumstances in recipient countries. The experience of ventures that have focused on the former Soviet world and on China and its neighbors suggests several tentative—and not always mutually consistent—lessons about the types of "procedural" and "substantive" features which are conducive to effectiveness. They also point to one overarching lesson about the importance of establishing favorable legal-institutional and legal-cultural environments in countries where U.S. actors seek to promote markets, democracy, and the rule of law.

## 2. U.S. LEGAL ASSISTANCE AND THE EXPORT OF U.S. LEGAL MODELS

### 2.1. *An Overview*

Federal government agencies and large private foundations have established substantial programs to extend legal assistance and offer legal advice abroad. They have been joined in this effort by countless U.S. institutions and individuals who have undertaken broadly similar but smaller scale projects, and by Americans who have participated in other modes of offering advice and spreading U.S. legal ideas and ideals.<sup>3</sup> Collectively, these undertakings have placed the United States at the forefront of current international efforts to export legal models and to provide assistance to those seeking to reform laws and reconstruct legal institutions around the world.

#### 2.1.1. *Shared Aims, Global Reach, and Diverse Programs*

In defining their overall aims, virtually all U.S. legal advice and aid programs explicitly have sought to promote the development of some or all of the following: the rule of law, legal and institutional requisites of sustainable multiparty democracy, and legal and institutional frameworks for economic markets. In pursuing such goals, legal assistance and export programs have reflected and supported broader imperatives of U.S. foreign policy.<sup>4</sup>

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<sup>3</sup> One partial, and dated, directory of U.S. initiatives to support constitutionalism, democracy and the rule of law in Eastern Europe has over two hundred pages of entries. See A.E. DICK HOWARD, *DEMOCRACY'S DAWN: A DIRECTORY OF AMERICAN INITIATIVES ON CONSTITUTIONALISM, DEMOCRACY AND THE RULE OF LAW IN EASTERN EUROPE* (1991).

<sup>4</sup> In an approach which had discernible roots in the Reagan years, the Bush and Clinton administrations have pursued this agenda (especially with respect to the CEE/NIS region and the P.R.C.) throughout the period after the collapse of the Soviet Union and its empire. This period has also included most of the "reform era" in China and in neighboring socialist or authoritarian regimes. Prominent examples from the Bush era include the SEED and FREEDOM support acts which, respectively, provided funds to support democratic and market-oriented reforms—in part by providing legal advice and assistance—in CEE countries and in the NIS. Reflecting a broadly similar agenda are the Clinton administration's policies of promoting "market democracies," pursuing "democratic enlargement," assigning U.S. trading interests an extremely prominent role in U.S. foreign policy, and at times, pressing a human rights agenda in China and elsewhere. See, e.g., Thomas Carothers, *Recent US Experience with Democracy Promotion*, 26 IDS BULL., No. 2, at 62 (1995);

Further, they have often defined these goals in strikingly, if unselfconsciously, "American" terms.

The United States Agency for International Development ("USAID"), which administers and distributes the lion's share of the federal government's budget for legal export and assistance, has supported a range of programs that have sought to promote the "rule of law," defined as fostering the legitimacy, accountability, fairness, and effectiveness of laws and legal systems in recipient countries.<sup>5</sup> In Latin America, where USAID has claimed that the work it has supported has been the region's foremost "rule of law"-supporting aid initiative, USAID-backed programs' stated aims have been increasing the professionalism of the judiciary, access to justice, respect for human rights, and support for democratic elections.<sup>6</sup> From South and Southeast Asia to Latin America to South Africa to the former Soviet Bloc, country-specific USAID-supported projects officially have endeavored to make democratic legislatures more competent and more independent.<sup>7</sup> USAID's law-related programs for CEE and the NIS have been underwritten by funds provided under the Support for Eastern European Democracies ("SEED") and Freedom for Russia and Emerging Eurasian Democracies and Open Markets ("FREEDOM") Support Acts, which mandate support for democratic and market-oriented change. USAID has used those resources to underwrite legal assistance (along with other programs) in pursuit of declared principal goals that include "economic restructuring" and "democratic transition," and subsidiary goals that include fostering the rule of law, civil society, "checks and

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Jacques deLisle, *Disquiet on the Eastern Front: Liberal Agendas, Domestic Legal Orders, and the Role of International Law After the Cold War and Amid Resurgent Cultural Identities*, 18 FORDHAM INT'L L.J. 1725 (1995); David M. Lamp-ton, *America's China Policy in the Age of the Finance Minister: Clinton Ends Linkage*, 139 CHINA Q. 597 (1994).

<sup>5</sup> See Ross Bankson, *Four Strategies for Supporting the Rule of Law*, 8 USAID EVALUATION NEWS No. 1 at 2.

<sup>6</sup> See USAID, *USAID FY 1998 Congressional Presentation* (last modified Mar. 24, 1999) <<http://www.info.usaid.gov/pubs/cp98>> [hereinafter *1998 Congressional Presentation*].

<sup>7</sup> See USAID, *Publications* (last modified Mar. 24, 1999) <<http://www.info.usaid.gov/pubs/>> (citing reports on legislature programs in Nepal, Philippines, Poland, and Central America); see also USAID, *Democracy* (last modified Mar. 24, 1999) <<http://www.info.usaid.gov/democracy/>> (discussing democratization and rule of law promoting activities in Cambodia and South Africa).

balances" in government structures, legal accountability of government, the free flow of information about government, privatization of state-owned assets, and market-compatible law reforms.<sup>8</sup> USAID's "rule of law" program for the NIS region has set forth a set of ends that include enhancing the capacity and accountability of judicial systems, increasing access to justice for ordinary citizens, promoting protection for "due process" values, and supporting the development of market-oriented commercial law.<sup>9</sup>

Other government agencies' programs, operated independently or with support and cooperation from USAID, have articulated similar aims. A few examples suggest the broader pattern. The United States Information Agency ("USIA") has adopted a "human rights and democracy" agenda that seeks to advance the rule of law abroad by providing many foreign countries with access to U.S. legal experts and expertise.<sup>10</sup> USIA's substantial International Visitors' Program has welcomed groups of foreign lawyers, officials, and others to the United States to meet and exchange views on such subjects as human rights, democracy, criminal justice, administrative law, and judicial administration.<sup>11</sup>

The Department of State's "rule of law" program, in conjunction with USAID's Democratic Pluralism Initiative, has had an official purpose of helping foreign governments to build political and judicial systems that promote democracy, protect human rights, and provide accountable government.<sup>12</sup> The Administrative Conference of the United States ("ACUS")—a body that includes representatives of most major federal government agencies—has provided advice to foreign states on improving administrative law, thereby increasing the legal accountability of

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<sup>8</sup> See 1998 Congressional Presentation, *supra* note 6.

<sup>9</sup> Many of the details about USAID programs can be found in USAID's Congressional Presentations, which are annual report-like documents prepared in connection with the agency's budget requests to Congress, and in USAID's periodical publication, *USAID Evaluation News*.

<sup>10</sup> See 1998 Congressional Presentation, *supra* note 6.

<sup>11</sup> See USIA, *International Visitor Program* (visited Mar. 24, 1999) <<http://e.usia.gov/education/ivp/usintiv.htm>>.

<sup>12</sup> See United States Information Agency, United States Gov't Int'l Exchange & Training Program Report for Fiscal Year 1995 [hereinafter USIA International Exchange 1995]; United States Information Agency, United States Gov't Int'l Exchange & Training Program Report for Fiscal Year 1994 [hereinafter USIA International Exchange 1994].

government in recipient countries.<sup>13</sup> The federally funded National Endowment for Democracy ("NED") has supported advice on matters relating to electoral laws and legislative procedures under its general mandate to support efforts to strengthen democratic institutions abroad.<sup>14</sup> The U.S. government's "democracy assistance" programs more generally have included "rule of law"-promoting programs as a significant component.<sup>15</sup>

Programs with similar aims have been scattered throughout the federal government's legislative and judicial branches as well. For example, the Committee on International Judicial Relations of the Judicial Conference of the United States has had a stated goal of promoting the rule of law abroad (in part through serving as a repository for rule of law materials).<sup>16</sup> The Congressional Research Service has participated in USAID-supported programs to strengthen emerging democratic legislatures in several developing countries and former socialist states.<sup>17</sup>

Federal agencies' efforts have addressed reforms in economic as well as "political" law. The Commerce Department's USAID-funded Commercial Law Development Program ("CLDP") has offered a variety of services avowedly seeking to contribute to the United States' overall effort to support political and economic reform abroad by providing assistance (primarily to the NIS and CEE countries) "with respect to the development and implementation of laws . . . affecting trade and investment."<sup>18</sup> The De-

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<sup>13</sup> See Sally Katzen, *The Role of the Administrative Conference in Improving the Regulatory Process*, 8 ADMIN. L.J. AM. U. 649, 662 (1994) (describing 1993 activities).

<sup>14</sup> Among other activities, the NED publishes the *Journal of Democracy*. On the NED, see generally Thomas Carothers, *The NED at 10*, 95 Foreign Pol'y 123 (1994).

<sup>15</sup> See, e.g., THOMAS CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE: THE CASE OF ROMANIA 51 (1996) [hereinafter CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE].

<sup>16</sup> See Glenn Robert Lawrence, *Are We Exporting Our Legal System?*, 41 FED. B. NEWS & J. 672, 676-77 (1994).

<sup>17</sup> See 1998 Congressional Presentation, *supra* note 6; United States Agency for International Development, *Legislative Strengthening in Poland* (visited Mar. 30, 1999) <[http://www.dec.org/pdf\\_docs/pnaby213.pdf](http://www.dec.org/pdf_docs/pnaby213.pdf)> [hereinafter *Legislative Strengthening in Poland*]; United States Agency for International Development, *Parliamentary Assistance in Nepal* (visited Mar. 30, 1999) <[http://www.dec.org/pdf\\_docs/pnaby218.pdf](http://www.dec.org/pdf_docs/pnaby218.pdf)> [hereinafter *Parliamentary Assistance in Nepal*].

<sup>18</sup> United States Department of Commerce, Office of General Counsel, *Commercial Law Development Program* (visited Mar. 15, 1999)

partment of Justice, the Federal Trade Commission (FTC), the Securities and Exchange Commission, and other agencies with a substantial focus on economic law also have been operating assistance programs supporting market-oriented legal reforms abroad.<sup>19</sup> SEED funds have been combined with additional USAID allocations to support advice on market-promoting laws in Central and Eastern Europe. NED's "democracy" mandate has been taken to include support for market-oriented reforms, as is reflected by the presence of the Center for International Private Enterprise (an affiliate of the U.S. Chamber of Commerce) among its half-dozen core grantees.

Major legal export and assistance endeavors from the private, non-profit sector have followed the same general creed of markets, democracy, and the rule of law. The massive Central and Eastern European Law Initiative ("CEELI") of the American Bar Association ("ABA") has defined itself as "a public service project . . . designed to advance the rule of law in the world by supporting legal reform" in CEE and the NIS.<sup>20</sup> Specific CEELI program titles include Bar Development (which has sought to advance the development of more competent and independent legal professions), the Commercial Law Program (which has sought to aid transitions to market economies), Criminal Law Reform (which has sought to improve the quality of personnel on all sides of the criminal justice system and to address problems of corruption and gangs), and Judicial Reform (which has sought to foster independent and professional judiciaries).<sup>21</sup>

Since before CEELI was established in 1990, the ABA International Law and Practice Section has supported projects seeking to advance "the world rule of law," including a decades-old legal

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<<http://www.ogc.doc.gov/ogc/cldp/cldp.html>> [hereinafter *Commercial Law Development Program*].

<sup>19</sup> See, e.g., USIA International Exchange 1995, *supra* note 12; USIA International Exchange 1994, *supra* note 12; Lawrence, *supra* note 16, at 672.

<sup>20</sup> CENTRAL AND EASTERN EUROPEAN LAW INITIATIVE, AMERICAN BAR ASSOCIATION, ASSISTING EMERGING DEMOCRACIES (1997) [hereinafter CEELI PAMPHLET].

<sup>21</sup> For descriptions of CEELI and its activities, see Central and Eastern European Law Initiative, American Bar Association, *American Bar Association Central and East European Law Initiative* (last modified Aug. 29, 1998) <<http://www.abanet.org/ceeli/home.html>> [hereinafter *CEELI Website*], and CENTRAL AND EASTERN EUROPEAN LAW INITIATIVE, AMERICAN BAR ASSOCIATION, CEELI UPDATE (1998).

educational and professional exchange program. More recent ABA assistance efforts with similar aims have included technical assistance to nations in the Arab world that have pursued legal reforms "conforming to international legal standards," a "law and democracy program" for Cambodia to aid in "planning and implementing legal and judicial reforms to promote democracy, a market economy and the rule of law," and a planned CEELI-like initiative for Africa.<sup>22</sup>

Smaller scale efforts by other U.S. lawyers' voluntary organizations have embraced many of the same ends. The Federal Bar Association, for example, has established a "Democracy Development Initiative" to promote the rule of law by assisting countries (primarily in the former Soviet Bloc) in reforming "governmental and legal systems in accordance with democratic principles such as the protection of due process and civil rights."<sup>23</sup> Although they often have not articulated their purposes so fully and formally, a myriad of smaller efforts by state and local bar associations have undertaken "rule of law" and "legal reform" projects in various countries and sub-national regions that have broadly paralleled the methods and, at least implicitly, embraced the articulated goals of the core ABA programs.<sup>24</sup>

Large, multipurpose philanthropic foundations have been an important part of the picture as well. The Ford Foundation has

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<sup>22</sup> Support for the world role of law is found in Goal VIII of the ABA, and the world role of law is a principal focus of the International Law and Practice Section of the ABA. The educational and professional exchange program referred to in the text is ILEX, established in 1968 and dedicated to the "proposition that a worldwide exchange of ideas and programs will lead to a heightened level of learning and understanding for all." American Bar Association, *ABA Section of International Law and Practice Webpage* (last modified Feb. 26, 1999) <<http://www.abanet.org/intlaw/home.html>> [hereinafter *ABA Website of International Law*].

<sup>23</sup> Lawrence, *supra* note 16, at 672; see also Alfred F. Belcuore, *Meeting the Founders: Russians and Kazakhs Work for Democracy*, 25 L. & POL'Y INT'L BUS. 461 (1994) (describing the Federal Bar Association's Democracy Development Initiative).

<sup>24</sup> See, e.g., Ron Brown, *Legal Exchange with China*, 1995 HAW. B.J. 22, 23-24 (1995) (describing projects involving China); John D. Shullenberger, *The Russian Federation and Karelia: Rapid Change and the Rule of Law*, 21 VT. B.J. & L. DIG. 20 (1995) (describing Vermont-Karelia Rule of Law Project). See generally Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 569 (1994) (describing Illinois State Bar Association-Warsaw lawyers' group "sister bar program") [hereinafter Waller, *Neo-Realism*].

provided considerable funding for law-related projects in the context of programs which have declared their aims to be the advancement of democracy, markets and legality. Its "governance and public policy" program has supported efforts to reform and strengthen government institutions (especially parliaments), to provide resources for legal services for the poor and other underserved populations, and, more broadly, to encourage activities that reinforce democracy in a number of developing and reforming countries.<sup>25</sup> The beneficiaries of the Ford Foundation's "rights and social justice" programs include projects that undertake to train judges, enhance awareness of human rights concerns, increase access to justice, and strengthen the rule of law underpinnings of democracy in many parts of the developing world.<sup>26</sup>

The express purposes of Ford Foundation programs that have targeted specific regions include supporting efforts to: (1) develop "institutional and individual skills"<sup>27</sup> necessary for economic reform in countries that are abandoning centralized planning; (2) make governments more accountable in the emerging democracies of Asia; (3) strengthen democracy, human rights, and government accountability in Latin America; (4) establish open elections, the rule of law, human rights and government accountability in Africa; (5) strengthen democratic institutions (including legislatures and courts), legal reform, and the rehabilitation of legal education in the CEE and NIS countries; and (6) facilitate "China's efforts to rule by law."<sup>28</sup> In the same general vein, the Asia Foundation, which has included law-related assis-

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<sup>25</sup> See, e.g., The Ford Foundation, *Ford Foundation 1995 Annual Report* <<http://www.fordfound.org/AR.95/AR.95.WholeThing.html>> (describing the Governance and Public Policy program) [hereinafter *Ford Foundation 1995 Annual Report*].

<sup>26</sup> See, e.g., The Ford Foundation, *Rights and Social Justice, Ford Foundation Annual Report 1995* <<http://www.fordfound.org/AR.95/AR9511.html>>.

<sup>27</sup> See The Ford Foundation, *Regional Overviews: Asia, Ford Foundation 1995 Annual Report* <<http://www.fordfound.org/AR.95/AR9519.html>> [hereinafter *Ford Foundation Regional Overviews*].

<sup>28</sup> *Id.* (describing the "Legal Services" offered under the "Rights and Social Justice" Program). One-third of the Foundation's Africa funds are devoted to the agenda described in the text. The China agenda referred to in the text is described as one of "the major objectives of the Foundation's work" in the P.R.C. See *id.* Accounts of the Ford Foundation's relevant activities and aims can be found in the Ford Foundation Annual Reports, and the organization's quarterly publication, *The Ford Foundation REPORT*, which are available at <<http://www.fordfound.org/about/about.html>>.



tance efforts among its programs for China and several other nations in East and Southeast Asia, has declared that building democracy, strengthening the rule of law, and furthering economic reforms are among its principal stated goals.<sup>29</sup>

Created and steered by international financier and Hungarian emigré George Soros, the Soros Foundation has sponsored significant law-related programs as a part of its extensive program of support for “open societies”—a term that encompasses democracy, free markets, and the protection of individual liberties. Coordinated and overseen by its main offices in New York and Budapest, the Soros Foundation network operates primarily through national-level “Open Society Foundations,” with approximately fifty offices in over a dozen countries, mostly in the CEE-NIS region. Guided and supported by the Soros Foundation’s Constitutional and Legal Policy Institute (“COLPI”), the law-related activities of the national-level foundations and the projects of their associated law centers have pursued an agenda of supporting legal reform efforts to improve the protection of human rights, the training of judges and lawyers, and the efficacy of mechanisms for government accountability (including support for organizations that monitor and report on legislatures, support for education, and support for journalists who cover legal and government issues, and support for efforts to reform administrative law).<sup>30</sup> In addition, the Soros initiatives have included the Central European University, located in Budapest, which has offered U.S.-accredited degree courses in legal studies to students from around the region and has operated a “Privatization Project” that has sought to provide education and training to support a key element in the re-

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<sup>29</sup> The economic reform goal includes increasing the system’s capacity to deal with the adverse consequences of reform processes. Other goals of the Foundation include fostering peace and cooperation in international relations. See The Asia Foundation, *The Asia Foundation* (last modified Nov. 7, 1998) <<http://www.asiafoundation.org>> [hereinafter *Asia Foundation Website*].

<sup>30</sup> Descriptions of the Soros Foundation, the various Open Society Foundations and Institutes, and the Constitutional and Legal Policy Institute can be found in the Soros Foundation Annual Reports and on the Soros Foundation’s Webpage, (visited Mar. 27, 1999) <<http://www.soros.org>> [hereinafter *Soros Foundation Website*]. See also Constitutional and Legal Policy Institute, *Constitutional and Legal Policy Institute Website* (last modified Sept. 28, 1998) <<http://www.osi.HU/COLPI/>> (detailing the mission, work, and research of the institute) [hereinafter *COLPI Website*].

gion's turn to economic markets.<sup>31</sup> Major U.S.-based foundations, including the German Marshall Fund of the United States, Soros, and Ford, have provided support, or funded technical assistance, to emerging non-governmental organizations (NGOs) in CEE countries that have included legal education and "rule of law" initiatives on their human rights and democracy agendas.<sup>32</sup>

As the foregoing descriptions suggest, U.S.-based and U.S.-funded legal export and assistance efforts have pursued their agendas of promoting democracy, markets, and/or legality in nearly every part of the world outside the established industrial democracies of the West and Japan. USAID has funded "rule of law" and other legal assistance projects at the regional level in Sub-Saharan Africa, South Africa, CEE, NIS, Asia, and Latin America, and at the national level in the vast majority of countries in these regions (including an especially large program to develop pro-market business, commercial, and other laws in Indonesia).<sup>33</sup> ACUS's administrative law work has counted China and Ukraine among its targets, and its "rule of law" program has sent academics, judges, and court staffs to several African states.<sup>34</sup> USIA's law programs have included the NIS, Latin America, and

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<sup>31</sup> See KEVIN F.F. QUIGLEY, FOR DEMOCRACY'S SAKE: FOUNDATIONS AND DEMOCRACY ASSISTANCE 97-101 (1997) (describing the creation, objectives, and accomplishments of the Central European University); Thomas Carothers, *Aiding Post-Communist Societies: A Better Way?*, PROBS. OF POST COMMUNISM, Sept.-Oct. 1996, para. 5 (describing the Soros Foundation's emphasis on education) [hereinafter Carothers, *Aiding Post-Communist Societies*]; Central European University, *Central European University* (visited Mar. 23, 1999) <<http://www.soros.org/ceu.html>> [hereinafter *Central European University*].

<sup>32</sup> Examples of direct and indirect recipients include the Democracy After Communism foundation in Hungary and Romanian human rights groups.

<sup>33</sup> For accounts of USAID's Caribbean and Central American "justice improvement" programs and the USAID-funded program on commercial law for Indonesia (which are beyond the scope of the CEE/NIS and P.R.C.-focused efforts that provide the main examples in this article), see Michael Ross Fowler & Julie M. Bunck, *Legal Imperialism or Disinterested Assistance?: American Legal Aid in the Caribbean Basin*, 55 ALB. L. REV. 815 (1992) (providing case studies of the role of American legal assistance in the Central American states of Guatemala and Belize) and David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 482-87 (1994) (describing the goal of the USAID-funded program for Indonesia known as ELIPS).

<sup>34</sup> See Katzen, *supra* note 13, at 662 (describing efforts conducted by ACUS in 1993).

other areas.<sup>35</sup> Programs of the Departments of State, Commerce and Justice, the SEC, and the FTC have provided technical legal assistance to their counterparts, and to post-socialist governments more broadly, in Central and Eastern Europe and elsewhere.<sup>36</sup> Assistance from the judicial and legislative branches has concentrated primarily on the CEE and NIS region, but (especially on the legislative side) has extended to a number of Asian nations as well.<sup>37</sup>

Programs funded or operated by non-governmental, non-profit organizations have had similarly broad geographic coverage. The Ford Foundation has supported “rule of law” and law-related democracy-supporting projects and more technical forms of legal assistance in Africa, Latin America, China, South Asia, Southeast Asia, and in recent years parts of the former Soviet Bloc.<sup>38</sup> The Asia Foundation has run programs to bolster legislative skills and to support democracy and legal reform on a multi-national level in East and South Asia and in individual countries, including China, Vietnam, and Cambodia. The various Soros Foundations’ legal programs have operated primarily, but not exclusively, in Central and Eastern Europe. Since two years after its 1990 founding, CEELI’s jurisdiction has included most of the former Soviet Union, as well as Central and Eastern Europe. Other bar association projects have ranged from the former Soviet world to China and the Middle East.<sup>39</sup> In addition, university-based “institutes” and “projects” have offered formal programs of legal advice to support market-oriented reforms in a similarly broad array of recipients including, for example, Mongolia and Russia.<sup>40</sup>

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<sup>35</sup> See 1998 Congressional Presentation, *supra* note 6.

<sup>36</sup> See Kovacic, *Competition Policy Entrepreneur*, *supra* note 2, at 470-73 (discussing USAID-funded DOJ-FTC programs for assisting competition policy agencies in CEE).

<sup>37</sup> See *id.* (discussing efforts to reform competition law in Mongolia).

<sup>38</sup> See, e.g., *Rights and Social Justice*, *supra* note 26; Ford Foundation, *Peace and Social Justice, Ford Foundation 1997 Annual Report* (last modified Mar. 26, 1999) <<http://www.fordfound.org/AR.97/psj/index.html>>.

<sup>39</sup> See Brown, *supra* note 24; Lawrence, *supra* note 16; Shullenberger, *supra* note 24; ABA *Website of International Law*, *supra* note 22 (regarding the Middle East).

<sup>40</sup> See, e.g., Kovacic, *Competition Policy Entrepreneur*, *supra* note 2, at 437-74 (describing the University of Maryland’s Center for Institutional Reform and the Informal Sector (IRIS) and its work with Mongolia); Robert L. Knauss, *University of Houston Russian Petroleum Legislation Project*, 15 HOUS. J. INT’L

2.1.2. *The Complexity of "U.S. Exporters" and the Ambiguity of "U.S. Exports"*

A complicated web of relationships among sources of funding, intermediary organizations, and end-point providers of advice connects the diverse participants in the U.S. "legal export" and "legal aid" processes to one another and to entities in "importing states" and "beneficiary countries."

While USAID disburses the greatest portion of government resources for these programs, its role in the direct provision of legal advice and assistance is modest. USAID helps to fund, and sometimes cooperates with, other federal government agencies that operate programs of technical assistance. Some of these government programs have included the direct provision of legal advice and technical legal assistance by government lawyers, economists, and other federal employees. Examples of such partly USAID-supported government activities include: (1) the State Department's various "rule of law" programs;<sup>41</sup> (2) a joint venture between the FTC and the Department of Justice's Antitrust Division to provide advice and assistance on competition law and policy to several CEE countries;<sup>42</sup> (3) SEC projects to advise its Hungarian counterpart and to assist Hungary in preparing corporations and securities laws;<sup>43</sup> (4) ACUS's advice to foreign governments on administrative law and related matters;<sup>44</sup> and Congressional Research Service, Library of Congress, and (5)

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L. 633 (1993) (describing the role played by the University of Houston Law Center in helping to draft Petroleum Legislation for Russia).

<sup>41</sup> See USIA International Exchange 1995, *supra* note 12; see also USIA International Exchange 1994, *supra* note 12.

<sup>42</sup> See *Foreign Authorities Expect to Focus on Mergers and Anticartel Law Enforcement*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1550, at 104 (Jan. 30, 1992) (stating that USAID issued a \$7.2 million grant to assist legal programs in Poland and Czechoslovakia); Kathleen E. McDermott, *U.S. Officials Provide Competition Counseling to Eastern Europe*, ANTITRUST, Fall/Winter 1991, at 4 [hereinafter McDermott, *Competition Counseling to Eastern Europe*].

<sup>43</sup> See James R. Doty, *Capital Market Developments in Central and Eastern Europe: The SEC Perspective*, 743 PRACTISING L. INST.: CORP. L. PRACTICE COURSE HANDBOOK SERIES 111, at 128-29 (1991) [hereinafter Doty, *SEC Perspective*].

<sup>44</sup> See Katzen, *supra* note 13, at 662 (1994) (noting that Congress has authorized ACUS to offer such advice, on a "reimbursable" basis, with the concurrence of USAID, the State Department, or USIA).

other organizations' work to strengthen legislatures in CEE, Asia, and Central America.<sup>45</sup>

Some of USAID's (and other government agencies') efforts to offer legal advice and assistance abroad have blended public and private sector participation. Some initiatives backed by USAID or USIA have employed private lawyers or experts, often in combination with government personnel, as direct providers of advice and assistance. Examples include the Commerce Department's seminars, which have involved groups of lawyers from across several government departments and commissions and private lawyers (some with experience in federal agencies),<sup>46</sup> as well as programs that send judges, Department of Justice lawyers, and private experts to provide criminal law reform assistance in the former Soviet world.<sup>47</sup>

USAID, and other government entities (often operating with USAID allocations), also have channeled federal funds for legal exports and assistance to a wide variety of private sector programs, typically through the mechanism of grants to U.S. intermediary organizations. Major recipients have included some of the principal foundations active in the provision of legal advice and aid abroad, including CEELI (the expenses of which are largely covered by USAID) and the Asia Foundation.<sup>48</sup> A modest portion of the National Endowment for Democracy's limited pool of federal government money has been expended through grants to law-related programs operated in the CEE/NIS region, East Asia, and other parts of the developing world, by the international affairs wings of the Democratic and Republican Parties, the Center for International Private Enterprise (associated with

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<sup>45</sup> See, e.g., 1998 Congressional Presentation, *supra* note 6 (detailing the budget for economic and humanitarian assistance activities).

<sup>46</sup> See U.S. Department of Commerce, *Commercial Law Development Program: Consultive Services and Training Programs* (Oct. 1997) (unpublished document on file with Department of Commerce) [hereinafter CLDP: *Consulting and Training*]; see also *Commercial Law Development Program*, *supra* note 18.

<sup>47</sup> See Lawrence, *supra* note 16, at 672-74; 1998 Congressional Presentation, *supra* note 6.

<sup>48</sup> See CEELI Website, *supra* note 21 (noting the importance of USAID funding); *Parliamentary Assistance in Nepal*, *supra* note 17 (describing a program that dates to 1990 and includes USAID grants to the Asia Foundation).

the U.S. Chamber of Commerce), and the Free Trade Union Institute (affiliated with the AFL-CIO).<sup>49</sup>

Through numerous, usually smaller, and more discrete allocations, USAID and other federal agencies (again, often using USAID-provided funds) have supported a wide range of "contractors" who have offered direct legal assistance or extended material and technical support to reformers seeking legal, legal-institutional, and legal-educational reform in many countries.<sup>50</sup> Typically, the contractors have been U.S. entities. Recipients of USAID funds under such arrangements have included particular projects of large, established assistance-providing organizations, such as CEELI and the Harvard Institute for International Development.<sup>51</sup> Beneficiaries also have included smaller and more specialized legal assistance projects, such as a Central European University program to train officials in the requisites of privatizing state-owned economies, a University of Maryland-based institute that provided assistance to drafters of Armenia's bankruptcy law, and a Georgetown Law School program to advise on a range of economic law reform issues in then-newly independent Estonia.<sup>52</sup> Major accounting firms, local bar associations, other private voluntary organizations, and individual expert consultants can also be counted among the vast and varied pool of USAID's U.S. contractors.<sup>53</sup>

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<sup>49</sup> See 1998 Congressional Presentation, *supra* note 6 (describing the national Endowment for Democracy, for which the congressional appropriation allocates 40% to the CEE/NIS, 17% to East Asia, and 8%-15% each for other regions of the developing world).

<sup>50</sup> See, e.g., Kovacic, *Competition Policy Entrepreneur*, *supra* note 2, at 470-73.

<sup>51</sup> See 1998 Congressional Presentation, *supra* note 6.

<sup>52</sup> See Central European University, *supra* note 31 (regarding the Central European University ("CEU") program); 1998 Congressional Presentation, *supra* note 6 (concerning the University of Maryland project); J. Peter Byrne & Philip G. Schrag, *Law Reform in Estonia: The Role of Georgetown University Law Center*, 25 L. & POL'Y INT'L BUS. 449 (1994) (describing the Georgetown project, supported through the Commerce Department's CLDP, which receives USAID funds).

<sup>53</sup> See Shullenberger, *supra* note 24; Samuel L. Bufford, *Bankruptcy Law in European Countries Emerging from Communism: The Special Legal and Economic Challenges*, 70 AM. BANKR. L.J. 459, 460 n.20 (1996) (describing Deloitte & Touche's role in training Romanian judges in bankruptcy); Hungary (last modified Mar. 3, 1999) <<http://www.info.usaid.gov/pubs/cp98/eni/countries/hu.htm>> (describing the use of SEED money for individual consultants sent to Hungary).

The U.S. government-aid sources' heavy reliance on U.S. intermediary organizations has been the object of concern and criticism, particularly on the grounds of high costs and the poor forging of links with indigenous organizations and individuals in recipient countries. Perhaps partly in response to such external critiques and in-house worries, official U.S. legal assistance and advice programs increasingly have disbursed a modest portion of their budgets in the form of grants made directly to host-country organizations that pursue goals compatible with the grant-issuing agency's agenda. Recipients of such aid from USAID and other federal government agencies have included democracy-supporting non-governmental organizations in South Africa, Central and Eastern Europe, and the former Soviet Union.<sup>54</sup>

As the variety of these federally-supported legal assistance and advice programs suggests, the official U.S. effort has been institutionally fragmented. The resulting low level of coordination and occasionally conflicting agendas of government and government-funded programs have led to some organizational reform efforts in the middle and late 1990s. These changes have included the creation of a senior office in the Department of State to coordinate "rule of law" programs and calls to bring greater integration and harmony to the activities of USAID's relatively autonomous regional bureaus and country programs.

The pattern in privately funded endeavors has been broadly similar and equally complex. Some grants from major U.S. non-profit foundations have supported the legal export and assistance programs of other U.S. foundations and voluntary organizations, with recipients ranging from the well-established, multi-purpose Asia Foundation to new, eclectic, and rather ad hoc programs that have sprung up under the auspices of local bar associations and other groups around the United States.<sup>55</sup> Some of the resources of private legal export and aid organizations have sup-

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<sup>54</sup> See 1998 Congressional Presentation, *supra* note 6; Democracy (last modified Mar. 3, 1999) <<http://www.info.usaid.gov/democracy>>.

<sup>55</sup> See, e.g., *About the Asia Foundation* (visited Mar. 3, 1999) <<http://www.asiafoundation.or/taf/about/abou-abou.html>> (describing the sources of the Asia Foundation's funding as including grants from U.S. foundations); *Governance and Public Policy: Approved Grants and Projects* (visited Mar. 3, 1999) <<http://www.fordfound.org/AR.96/AR9652.html>> (noting the grant to the Asia Foundation under the Ford Foundation's Government and Public Policy Program); Brown, *supra* note 24, at 22 (describing foundation grants to the US-ASIA Law Institute).

ported their relatively long-term employees' or volunteers' direct provision of legal advice and assistance to governments and educational and professional entities in recipient countries. Examples include some of CEELI's legal specialist postings to the former Soviet world, and some of the Asia Foundation's work with national legislatures in South and Southeast Asia.<sup>56</sup> Foundation and non-profit sector funds also have sent experts, who otherwise have not been affiliated with the sponsoring organizations, overseas for brief stints as lecturers and consultants. CEELI and the Ford Foundation have been active in this area.<sup>57</sup> The experts have often been American legal academics, and the most frequent recipients have been countries in the CEE/NIS region.

Some foundations, including the Ford, Soros, and Asia Foundations, have expended a large portion of their resources for legal assistance through direct support for recipient-country organizations and institutions, including judges' organizations, bar associations, government bodies charged with institutional reform, and universities (for research on law-reform issues as well as for libraries and for legal education programs). The degree of oversight and supervision the granters exercise over such funded projects has varied considerably. The Ford Foundation's practice of having a resident staff member to coordinate and monitor its legal programs in China lies near the more engaged end of the spectrum of this relatively non-"command and control" mode of assistance. The role of the Soros Foundation's national-level Open Society Foundations and the regional coordinating function of COLPI seem to have been less "hands-on." Other instances of foundation support have tended toward a model of more "arm's-length" grant-giving.<sup>58</sup>

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<sup>56</sup> See, e.g., *CEELI Website*, *supra* note 21; *Asia Foundation Website*, *supra* note 29.

<sup>57</sup> Examples include the "Raising Rights Consciousness" program of lectures and seminars that the Ford Foundation supported for CEE-NIS countries, and CEELI's program of short term seminars. See The Ford Foundation, *The Ford Foundation Report, Summer 1993*, (visited Mar. 3, 1999) <<http://www.fordfound.org/QR.24.2/QR242.html>>; *Liaison and Legal Specialist Program* (visited Mar. 3, 1999) <<http://www.abanet.org/ceeli/liason.html>>.

<sup>58</sup> Examples include some of CEELI's work handled through resident liaisons and some of the Asia Foundation's work with local NGOs. See, e.g., *Parliamentary Assistance in Nepal*, *supra* note 17 (describing the Asia Foundation's role).



Resources for private, non-profit sector programs, and government-supported ones as well, have included a substantial component of volunteer services. CEELI, for example, has placed well over a hundred lawyers as volunteer liaisons or long-term specialists, hundreds more as short-term visiting advisors, and thousands more as U.S.-based sources of advice. CEELI estimates that the value of pro bono time provided by its volunteer lawyers reached \$55 million by mid-1996 and \$77 million by mid-1997.<sup>59</sup> On a more modest scale, the Federal Bar Association's Democracy Development Initiative established a "talent bank" of U.S. lawyers volunteering to assist CEE countries in constitutional and economic law reforms.<sup>60</sup> Efforts by local bar groups and other voluntary organizations generally have followed the same pattern.

In the public sector, the ACUS program, various USAID-backed initiatives, and USIA projects have relied upon the uncompensated services of federal judges, government lawyers, federal officials, and private lawyers who have offered legal advice and assistance by traveling to Africa, Asia, and the former Soviet Bloc or by meeting with, or lecturing to, visitors from most parts of the economically developing or formerly socialist world.<sup>61</sup> Beyond such institutional programs, more ad hoc groups of lawyers, scholars, and individual consultants have offered pro bono advice on constitutional and legal reform in the former Soviet Bloc and elsewhere.

University-based law schools have been another important component in the complicated pattern of providing and funding U.S. legal exports and advice. Sometimes with the support and cooperation of private foundations and government programs, and sometimes with their own resources, these U.S. educational institutions have offered everything from discrete projects that

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<sup>59</sup> See William Funk, *News from the Circuits*, 19 ADMIN. & REG. L. NEWS, Spring 1994, at 3; Paul Moxley, *CEELI: A Pro Bono Project of the ABA*, 9 UTAH B.J., Dec. 1996, 27 (describing data concerning CEELI's initial years); see also Lawrence, *supra* note 16, at 678 (noting that CEELI has 24 liaisons in CEE/NIS countries at any one time); Abner J. Mikva, *Building Justice in Central and Eastern Europe: When We're the Good Guys*, LEGAL TIMES, Aug. 19/26, 1996, at 21 (stating that 4000 attorneys, judges, and law professors participated in CEELI's first decade); *CEELI Website*, *supra* note 21 (providing more recent statistics on the number of participating lawyers and the value of contributions).

<sup>60</sup> See Lawrence, *supra* note 16, at 678.

<sup>61</sup> See, e.g., Lawrence, *supra* note 16, at 673-75, 677; 1998 Congressional Presentation, *supra* note 6.

provide a single country with technical advice on a single legal subject, to pre-existing educational programs that broadly expose foreign lawyers to U.S. laws and U.S.-style legal thinking. Examples of the former include the Russian Petroleum Legislation project at the University of Houston and some of a University of Maryland-based institute's work as a USAID contractor. Examples of the latter include LL.M. programs at many U.S. law schools and more specialized training sessions for foreign judges and legislators. Government funding for such activities has been provided through USAID contractor arrangements and a variety of scholarship and fellowship programs (such as those operated under IREX and the USIA/Fulbright John Marshall scholars programs for parts of the former Soviet world and by the Fulbright programs for many regions). Foundation support has come through such channels as the Committee on Legal Educational Exchange with China's programs (which, with the support of the Luce, Ford, and other foundations, have brought hundreds of P.R.C. legal scholars to the United States) and CEELI's sister law school program (which has matched more than a hundred U.S. law schools with a few dozen schools in the CEE states). Law schools' own financial aid packages to foreign graduate students have been another source.

Finally, modest funding for projects that seek to export U.S. legal models and assistance has come from abroad. Foreign governments and organizations have sometimes paid for the cost of U.S. legal consultants and experts (either directly or through multilateral organizations). Some U.S. foundations that have provided legal advice and assistance abroad have received donations from foreign governments and foundations.<sup>62</sup>

In sum, even a general overview shows a pattern of funding and providing "U.S. legal exports" that is complex, varied, and fragmented. The sources of resources for "export programs" have ranged from government appropriations to foundation money, foreign funds, and donated services. These resources have been disbursed and deployed through a tangled pattern of mixed sources, "nested" grants, and sub-grants among public and private organizations that have differed radically in size, style, purpose,

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<sup>62</sup> See, e.g., *About the Asia Foundation: Corporate Partners Program* (last modified March 3, 1999) <<http://www.asiafoundation.org/taf/about/about-corp.html>> (listing foreign governments and a wide range of corporate and individual donors as sources of its funding).

and nationality. The degree of oversight and control that granters or intermediary organizations have exercised over direct providers and grant recipients also has varied enormously. Predictably, there has been relatively little effective coordination among programs that have involved such numerous and diverse underwriters, providers, recipient nations, and funding arrangements.

The picture becomes more complex, and generalizations more difficult, when one focuses on the problems of defining "U.S. legal advice" or the export of "U.S. legal models." On one hand, labeling all of the relevant activities undertaken or funded by formal programs of the U.S. government and U.S. non-governmental organizations as "U.S. legal exports" overstates the scope and scale of efforts to export distinctly "U.S." laws and legal models. Not all aid and advice offered by U.S. entities and individuals have endorsed solutions that are distinctively American, or that are even minimally consistent with U.S. laws, the U.S. legal system, or the dominant views in U.S. legal culture. There are several possible motives for U.S. assistance providers' having eschewed a full-fledged effort to export U.S. laws and legal models. They range from a prudential calculation that such a strategy has offered the best chance of achieving outcomes that approach U.S. programs' goal of market-oriented, rights-protecting, and democratic orders abroad, to a genuine belief that U.S. models are basically flawed or, at least, ill-suited to the legal inheritance and future needs of recipient countries.<sup>63</sup>

However mixed or murky the motives, the pattern seems fairly clear. Many U.S. programs and providers have had an affirmative policy or practice of providing legal advice that is not distinctly "American." In some cases, this has taken the form of not focusing on substantive legal fields where U.S. models seem most at odds with world standards.<sup>64</sup> In other instances, this has meant emphasizing "universal," "international," or unspecified "general" standards as the well-spring of advice that also could be

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<sup>63</sup> The last of these views seems to be especially prominent in programs that target CEE, where U.S. models are claimed to be out of step with recipient countries' pre-socialist civil law traditions, and at odds with those nations' need to harmonize their laws with European Union norms in order to smooth their integration into Europe.

<sup>64</sup> For instance, full-blown U.S.-style separation of powers arrangements have not figured prominently in U.S. providers' advice on constitution drafting.

accurately presented as based on U.S. principles and experiences.<sup>65</sup> CEELI, some USAID-supported projects, and other U.S. providers focusing on the CEE region often have leaned toward providing advice that has emphasized Western European (rather than U.S.) models and have included Europeans on sponsored panels of advisors. Moreover, some U.S. experts—especially some legal academics—have been quite critical of existing U.S. models when they have offered advice on matters ranging from criminal procedure, to social and economic rights of citizens and antitrust regulation.<sup>66</sup> In addition, the practice of providing some legal assistance in the form of grants to organizations in recipient countries (and sometimes only loosely monitoring their activities) seems certain to have invited law reform and legal development efforts that look substantially to non-U.S. models and influences.

On the other hand, counting only formal U.S.-based and U.S.-run programs and projects of legal aid and advice as sources of “U.S. legal exports” and “U.S. legal assistance” significantly understates the extent of the phenomena. Much of the export and attempted export of U.S. laws and legal models has been occurring through other media. The U.S. government has promoted indirect “exports” of U.S. models. For example, it has pushed U.S.-style or U.S.-acceptable standards in multilateral organizations that shape “international” model standards or provide legal advice to countries undertaking legal reforms. Sometimes, this is a matter primarily of advocacy (as in the SEC’s role in pressing for standardized securities market regulations in IOSCO and other fora).<sup>67</sup> Other times, it has been more a matter of exercising

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<sup>65</sup> CEELI’s judicial reform programs cite the United Nations’ principles defining an independent judiciary, and CEELI’s description of its program of providing “concept papers” on general fields of law declares that such papers are not intended to provide instruction in, or advocate the adoption of, laws based particularly on U.S. models. See *CEELI Website*, *supra* note 21.

<sup>66</sup> Anecdotal examples from the literature on legal assistance abroad include a USAID official in Zimbabwe who scuttled efforts to support the development of a U.S.-style antitrust regime and U.S. academic experts who offered prescriptions concerning competition policy and laws that the Nepalese recipients of advice knew were at odds with existing U.S. rules and practices. See Kovacic, *Competition Policy Entrepreneur*, *supra* note 2, at 447, 461.

<sup>67</sup> See, e.g., Alejandro M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 461 (1995) (describing U.S. participation in multilateral foreign aid organizations, especially those concerning private international law and the Americas).

power (for example, through U.S. votes in multilateral aid-providing organizations that condition support for law reform and other activities on potential recipients' practices and progress in such law reform-related areas as protecting human rights and establishing market economies).<sup>68</sup>

In addition, U.S. government programs sometimes have cooperated with foreign government donors in ways that may have expanded (although they may also have diluted) the resources effectively devoted to promoting the export of U.S. or U.S.-compatible legal ideas and ideals.<sup>69</sup> Such collaboration, and the "leveraging" effect it may have had on U.S. resources, appears to be more commonplace in private foundation-funded activities.<sup>70</sup> Further, U.S. experts frequently have worked on projects supported and operated by international or multilateral organizations. Certainly these individual U.S. providers could be expected to draw upon and disseminate "U.S." models, and anecdotal evidence suggests that they have done so.<sup>71</sup> Moreover, just as U.S. lawyers and experts sometimes have declined or refused to endorse U.S. models, foreign lawyers and experts appear to have occasionally offered advice that has embraced some sig-

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<sup>68</sup> See, e.g., 12 U.S.C.A. § 635 (West Supp. 1999); 22 U.S.C.A. § 262d (West 1990).

<sup>69</sup> See 1998 Congressional Presentation, *supra* note 6.

<sup>70</sup> Examples include The Ford Foundation's support for the London-based International Center for the Legal Protection of Human Rights (Interrights), which promotes broadly U.S. Bill of Rights-style values and models in some of its workshops, as well as the collaboration between the Asia Foundation and Germany's Adenauer Foundation in working with the Cambodian Interior Ministry to develop and disseminate ideas on free and fair elections. See Ford Foundation, *Report Summer/Fall 1997: Recent Grants* (visited March 3, 1999) <<http://www.fordfoundation.org/QR.28.3/QR28310.html>>; Asia Foundation, *Programs: Project List, Cambodia* (visited March 3, 1999) <<http://www.asiafoundation.com/taf/programs/prog-proj-camb.html>>.

<sup>71</sup> One prominent example is a UNDP-sponsored program for China that included a large number of Americans in its limited cadre of foreign consultants and trainers. Even within the framework of a program that insisted, and to a significant degree acted, on the premise that laws are not readily "transplanted," the consultants and trainers relied heavily on American law materials as references and sources of comparative insight when they sought to equip Chinese recipients with the analytical tools necessary to craft legislation appropriate to local circumstances. See Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1, 3-4 (1996) [hereinafter Seidman & Seidman, *Drafting*].

nificant elements of U.S. laws, legal ideals, and models of a legal system.<sup>72</sup>

Finally, an apparently significant set of components in the contemporary export of U.S. legal models has included U.S.-based influences that have operated outside the structure of formal U.S. or multilateral aid or advice programs, and sometimes without any apparent or asserted element of offering assistance.

### 2.1.3. *Other Channels of U.S. Legal Export: Beyond Formal Assistance Programs*

In addition to the vast array of programs that have defined their principal goals as the provision of technical legal advice or the cultivation abroad of U.S.-style laws and legal orders, there have been several other unilateral U.S. channels for "exporting" U.S. law and legal models. These modes sometimes have been at least as formidable as formal advice or assistance efforts.

First, U.S. educational institutions have given foreign nationals extensive exposure to U.S. laws and ideas about law. Probably the most significant elements in this process are the burgeoning LL.M. programs at U.S. law schools. Many among the top tiers of U.S. law schools have provided these one-year graduate study programs for young and mid-career lawyers from around the world. LL.M. programs typically include a basic course that provides an introduction to U.S. law for foreign students, and several more specialized elective courses, most of which typically focus on some field of U.S. law and include both foreign LL.M. students and American J.D. students. The largest of these graduate programs have more than one hundred students, and the total number of foreign students studying law in the United States is thousands annually. Most participants are from Western Europe and the most prosperous nations in East Asia, but some have come from the regions that have been targeted by formal U.S. legal export and assistance programs. With rising prosperity in their home countries making more resources available for legal education abroad and U.S. government programs, foundation

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<sup>72</sup> Sometimes, this seems to have been prompted by recipients' demands. For example, some CEE audiences reportedly have sought a discussion of what they took to be the "original" or "underlying" U.S. model instead of what they saw as an imperfect Western European copy. See, e.g., Symposium, *supra* note 1, at 140-43 (providing remarks of Ambassador Richard Schifter and Professor Herman Schwartz).

grants, and law scholarships providing some support as well, students from the former Soviet Bloc, China, and other developing nations have come to comprise a small but growing share of the LL.M. population at U.S. law schools.<sup>73</sup>

A much smaller contingent of foreign lawyers and legal academics has been exposed to U.S. law and legal thinking as doctoral students or occasionally as visiting scholars or longer-term, part-time faculty members with formal appointments at U.S. law schools.<sup>74</sup> Many relatively long-term visits have occurred under the auspices of centers or programs for the study of the laws of the visitors' home countries or regions.<sup>75</sup> Much shorter term, but fairly intense, exposure to the ways of U.S. legal academe has occurred through visits to American law schools by delegations of deans from Central and Eastern European law schools, typically arranged by CEELI, and from the P.R.C.<sup>76</sup>

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<sup>73</sup> See R. Randle Edwards, *Legal Training for China Ventures*, 295, 310-11 (PLI Comm. Law & Practice Course Handbook Series No. 349, 1985) (describing the programs of the Committee on Legal Educational Exchange with China ("CLEEC"), funded by the Luce, Ford, and Chinn Ho Foundations. These programs placed over two hundred P.R.C. students and scholars at U.S. law schools and universities under agreements with various Chinese institutions during the 1980s and early 1990s). U.S. government programs that provide funding include IREX (particularly the new Ron Brown scholarship program) for students from CEE, and the Fulbright program for scholars from many countries. See United States Information Agency, *United States Information Agency Website* (visited Mar. 3, 1999) <<http://www.usia.gov>>.

<sup>74</sup> New York University's "Global Law School" program has been the most heavily publicized undertaking for giving a substantial number of prominent foreign legal scholars a formal affiliation with, and opportunities for a regular, intermittent presence at an American law school. More typical are visiting appointments, or the permanent but part-time appointments that some foreign legal academics hold on U.S. law faculties in conjunction with retained appointments at universities in their home countries.

<sup>75</sup> Examples include Harvard's East Asian Legal Studies program, Columbia's Center for Chinese Legal Studies, Center for Japanese Legal Studies, Center for Comparative Constitutionalism, and the University of Chicago's Center for the Study of Constitutionalism in Eastern Europe. See Neil Boyden Tanner, *The Failure of International Law to Internationalize the Legal Profession*, 17 J.L. & COM. 131 (1997).

<sup>76</sup> See Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?*, J. INST. FOR STUD. LEGAL ETHICS 297, 306-07 (1996) (describing CEELI-supported deans' visits); see also University of Michigan Law School, 42 LAW QUADRANGLE NOTES, no. 1, 33 (1999) (describing a visit by a delegation of P.R.C. law deans to Stanford, Berkeley, Harvard, Georgetown, CUNY, Columbia, and Yale Law Schools).

A less extensive and intensive channel of legal export by American institutions of legal education has been the summer programs that dozens of U.S. law schools operate in conjunction with foreign universities' campuses in Beijing, Moscow, and throughout Europe, Asia, Latin America, and parts of Africa.<sup>77</sup> Such programs usually focus on teaching U.S. students about U.S. and foreign law, but many of them also have included some structured or informal contact between U.S. participants in the programs and students, law faculty or lawyers from the host country. The summer abroad law programs thus have provided an opportunity for American students and faculty to disseminate information and ideas about U.S. law.<sup>78</sup> In addition, some of the summer programs for U.S. students have enrolled foreign students, and a handful of U.S. law schools have run overseas programs that teach foreign students U.S. law, sometimes as a preparatory course for pursuing an LL.M. in the United States.<sup>79</sup>

A substantial number of U.S. legal academics have also been teaching in law departments of foreign universities, sometimes offering courses in U.S. law and "general" or "international" courses that, in many cases, have been tinged with a U.S. perspective. Fulbright grants have supported dozens of law lecturer and researcher slots per year, with various other foundation and exchange programs adding considerably to that number.<sup>80</sup> Many of the slots have been in countries and regions that have been the principal foci of contemporary government and foundation-

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<sup>77</sup> Examples include Duquesne University's summer program at the University of Political Science and Law in Beijing, the University of San Diego's program in Moscow, and a host of programs in Western Europe. See Tom Stabile, *The Savvy Student's Guide to Studying Abroad*, NAT'L JURIST, Jan. 1999, at 36.

<sup>78</sup> In order to receive credit for foreign study, the study or summer abroad program must be affiliated with an ABA accredited law school. See American Bar Association, *Study Abroad* (visited Mar. 23, 1999) <<http://www.abanet.org/legaled/approved.html>>.

<sup>79</sup> Examples include Columbia's established summer program in Amsterdam and Temple's new masters program with the University of Political Science and Law in Beijing.

<sup>80</sup> In the case of China, the Fulbright program has recently had roughly five or six "law" slots per year, while the CLEEC program has supported dozens of U.S. scholars' research or teaching in China during the 1980s and 1990s. See COUNCIL FOR INTERNATIONAL EXCHANGE OF SCHOLARS, UNITED STATES INFORMATION AGENCY, FULBRIGHT SCHOLAR PROGRAM 1998-1999 (1997) [hereinafter FULBRIGHT PROGRAM]. For an overview of these programs in the 1980s, see Edwards, *supra* note 73.



supported U.S. legal assistance programs.<sup>81</sup> In addition, there has been some direct hiring of U.S. lawyers and legal academics as visiting or long-term members of foreign law faculties.<sup>82</sup> Some U.S. legal academics also have acted as legal exporters at the individual level when they have conducted research abroad and interacted with foreign colleagues and students.

Second, U.S. practicing lawyers have become a significant, if diffuse and unprogrammable, means for exporting U.S. legal ideas and ideals. The growth of this phenomenon is largely a product of the globalization of the legal profession and U.S. lawyers' leading roles in that process. Most of the largest U.S. firms have opened several foreign offices, to which they have posted U.S. lawyers who have worked closely with host-country counterparts, both outside and, increasingly, inside the firm. It has also become fairly commonplace for U.S. firms to have foreign lawyers working as associates or consultants in their U.S. offices for one to a few years, generally with the expectation that those lawyers will return to their home countries. In addition to the effects of such extended and intense contact among colleagues, a less intensive but more widespread flow of U.S. laws and legal values presumably has been occurring through the regular contacts that inhere in almost all major U.S. firms having foreign clients or having domestic clients with overseas business interests.<sup>83</sup> The latter sort of work, not infrequently, has made U.S. lawyers *de facto* ambassadors—often quite aggressive ones—for the adoption of U.S.-style practices in other countries' commercial and financial legal practices.<sup>84</sup>

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<sup>81</sup> In recent years, the Fulbright program advertised law positions in the CEE/NIS region. See FULBRIGHT PROGRAM, *supra* note 80.

<sup>82</sup> Law faculties in Hong Kong, Hungary, Japan, and the United Kingdom provide a few examples of long-term hires of U.S.-trained, U.S.-national law professors.

<sup>83</sup> By one estimate, legal services have become the U.S.'s fourth largest business and professional services sector export. Several studies have surveyed and assessed the broader phenomenon of the internationalization of U.S. law firms and legal practice. See, e.g., Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 764-824 (1994); Daly, *supra* note 76, at 297; Peter Roorda, *The Internationalization of the Practice of Law*, 28 WAKE FOREST L. REV. 141, 151-58 (1993).

<sup>84</sup> One frequently noted example is the pressure from U.S. banks (and other off-shore lenders) for New York-style documentation or for clauses specifying that New York law governs a transaction. See generally Barry W. Rashkover, Note, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227 (1985).

Third, the U.S. government has employed several legal means to press foreign states and foreign nationals to conform to U.S. laws or U.S.-acceptable legal standards on issues related to markets, democracy, and the rule of law. Most simply, many U.S. laws have at least de facto extraterritorial reach.<sup>85</sup> For example, the Antitrust Division of the Department of Justice has asserted its authority to apply U.S. competition laws to regulate activities outside the U.S., so long as the anti-competitive behavior abroad has a direct, foreseeable, and substantial effect on U.S. exports, commerce, or consumers.<sup>86</sup> Similarly, the U.S. Securities and Exchange Commission ("SEC") has long claimed jurisdiction over foreign traders whose activities have an impact on U.S. markets, or where frauds occurring primarily abroad include fairly minor actions in the U.S.<sup>87</sup>

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While much of this can be handled by contract law and directly involves only the foreign-linked sectors of the economy (and thus need not entail formal statutory or doctrinal change in the host country, especially in its domestic law), the practice certainly exposes recipient-country lawyers to U.S. legal ideas and approaches. It also can, and does, generate pressure for change in host-country law, both because of foreigners' desire for something more secure and less costly to establish than case-by-case contracting and because of the porousness of imagined boundaries between the "foreign-linked" and "purely domestic" sectors of the economy.

<sup>85</sup> For a general overview of the extraterritorial effect of U.S. laws, principally economic regulatory laws, see, for example, Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

<sup>86</sup> Although the U.S. approach to applying U.S. antitrust laws to foreign activities has been somewhat controversial and has changed somewhat during the last two decades, there has been a broad and consistent pattern of regulating or seeking to regulate activities outside the United States. See, e.g., Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 10-12 (1997) (describing the movement in U.S. antitrust enforcement toward extraterritorial application of U.S. antitrust laws) [hereinafter Fox, *Toward World Antitrust*]; Barry E. Hawk, *The International Application of the Sherman Act in Its Second Century*, 59 ANTITRUST L.J. 161, 163-67 (1990); 60 Minutes with Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 63 ANTITRUST L.J. 323, 338-39 (1994) (arguing that the extraterritorial application of antitrust laws is grounded in long-standing U.S. jurisprudence). In 1995, the ABA urged the U.S. government to support and ensure U.S. firms' access to foreign markets by enforcing U.S. antitrust laws extraterritorially, and by encouraging foreign states to enact, improve or enforce competition and intellectual property laws and to adopt laws prohibiting private agreements that impose restraints on trade that restrict U.S. companies' access. 1995 ABA SEC. INT'L L. & PRACTICE.

<sup>87</sup> See, e.g., James R. Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 FORDHAM L. REV. S77, S81-84 (1992) (discussing extraterritorial application of SEC regulations); Jill E. Fisch,

More diffusely and less controversially, U.S. economic regulatory laws have addressed the activities of the growing number of foreign subsidiaries, branches, joint-venture partners, and individuals conducting business in the United States. One prominent example is SEC registration and reporting requirements that apply to hundreds of foreign companies that have sought to issue equities in the United States.<sup>88</sup> Although such laws generally have limited direct effect abroad, their impact is doubtless felt back at the "home office," particularly where compliance with U.S. laws has required changes in the firm's organization or practices that would be inefficient or impossible to "compartmentalize" and to limit to either U.S. or overseas operations.

U.S. laws and proposed laws that address only U.S. nationals' activities have exerted another form of indirect legal pressure on foreign states to conform to U.S. legal standards. For example, the restrictions that the Foreign Corrupt Practices Act<sup>89</sup> impose on U.S. businesses' dealings with foreign governments, in effect, have demanded that foreign officials conform a portion of their public behavior to U.S.-style norms of proper government behavior.<sup>90</sup> The U.S. government has considered mandatory or model human rights standards for U.S. firms investing abroad, addressing issues ranging from U.S. subsidiaries' or contractors' labor practices to definitions of minimum acceptable human rights conditions in the countries in which U.S. companies may invest. Sometimes in the shadow of proposed laws and regulations of this sort, U.S. companies have adopted individual corporate codes of conduct or have pledged to adhere to broader initiatives in the

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*Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 541-46 (1993) (describing legal doctrines allowing for extraterritorial application of U.S. securities laws); Anne C. Flannery & Ben A. Indek, SEC Enforcement Efforts Reach Abroad, 651, 653-54 (PLI Corp. Law & Practice Course Handbook Series No. 713, 1990) (tracing the evolution of SEC efforts to reach foreign activity).

<sup>88</sup> See, e.g., Linda C. Quinn et al., Internationalization of the Securities Markets, 325, 327-37 (PLI Corp. Law & Practice Course Handbook Series No. 705, 1990) (describing the SEC reporting process for foreign issuers); James R. Silkenat, *Overview of U.S. Securities Markets and Foreign Issuers*, 17 FORDHAM INT'L L.J. S4, S4-S9 (1994) (same).

<sup>89</sup> See Julia Christine Bliss & Gregory J. Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?*, 20 L. & POL'Y INT'L BUS. 441 (1989).

<sup>90</sup> See Robert J. Lubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 L. & POL'Y INT'L BUS. 111 (1998).

tradition of the Sullivan Principles for investment in South Africa before the end of apartheid.<sup>91</sup> By making some level of protection for human rights and labor rights a precondition for firms' investment abroad, such moves may have become another U.S.-based channel for communicating and for pressing foreign states to implement U.S. or U.S.-acceptable standards and values.<sup>92</sup>

U.S. laws governing access to U.S. consumer and capital markets and to the benefits of U.S. government-funded programs have provided another channel for pressing foreign states to conform to U.S.-defined standards that concern matters of economic markets, political democracy, and the rule of law. For example, the "special 301," "super 301," and general anti-dumping and countervailing duty provisions in the U.S. trade laws authorize sanctions (primarily in the form of imposing targeted trade restrictions) as a response to other states' failure to live up to U.S. statutory definitions of adequate protection for intellectual property rights, or of fair international trade practices.<sup>93</sup> In addition, U.S. statutes provide that countries with very bad human rights records, non-market economies, or Marxist-Leninist systems are, variously, not to enjoy most-favored-nation ("MFN") trading privileges, several forms of U.S.-provided development assistance, favorable U.S. votes in multilateral aid-providing institutions, access to certain sensitive technologies, the benefits of Overseas Private Investment Corporation insurance, or the benefits of Export-Import Bank credit guarantees for their U.S. trading and investment partners.<sup>94</sup> These laws' role as vehicles for promoting accep-

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<sup>91</sup> See, e.g., Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 156-60 (1997); Diane F. Orentlicher & Timothy A. Gellatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 80-82 (1993).

<sup>92</sup> See *id.*

<sup>93</sup> If the country allegedly engaging in unfair trade practices is a non-market economy, only the anti-dumping law, not the countervailing duty law, is available to domestic industries claiming injury. See generally Gary N. Horlick & Shannon S. Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L LAW. 807 (1984).

<sup>94</sup> Many post-Soviet states' rapid but incomplete economic reforms in the aftermath of the dismantling of communist systems, and China's sustained and accelerating but still-limited economic reform, amid continuing human rights shortcomings and official commitments to a Marxist-Leninist political order, have made application of such laws to the P.R.C. and to countries in the CEE/NIS region especially complex, controversial, and subject to change. See generally Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket*

tance abroad of U.S.-defined standards has been enhanced by the existence and fairly frequent exercise of the President's authority to waive many of the restrictions they impose, and Congress's plenary power to revise the statutes, in response to particular countries' "progress" toward meeting statutory standards.<sup>95</sup>

These varied U.S. laws applicable to foreign states and firms and to overseas activities of U.S. entities, of course, have not always or inevitably demanded legal change in affected countries. Nevertheless, one should not therefore dismiss their possible significance as mechanisms for exporting U.S. models. Even where the focus of U.S. laws has been the behavior of foreign governments or overall conditions in foreign countries, legal and regulatory responses often seem to have been contemplated or demanded by the drafters or implementers of U.S. laws. For example, changes to China's intellectual property laws have been a key component in forestalling U.S. trade sanctions against the P.R.C. As another example, U.S. government determinations of whether countries in the CEE/NIS region qualify for privileges that the U.S. law makes available to "market economies" have depended in significant part on reforms in those countries' commercial and economic regulatory legislation.

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*Economies in Transition Under United States Antidumping and Countervailing Duty Laws*, 10 AM. U. J. INT'L L. & POL'Y 993 (1995).

<sup>95</sup> During the post-Soviet era, the privileges such laws authorize have been extended gradually to countries in the CEE/NIS region that have made the greatest progress in reforms toward political democracy, economic markets, and legal protection of human rights. See 22 U.S.C.A. § 2151n (West 1990)(tying human rights with development assistance); 22 U.S.C.A. § 2430b (West 1990)(same); Support for East European Democracy Program, 22 U.S.C.A. § 5401; Pub. L. No. 104-162, 110 Stat. 1414 (1996) (regarding Bulgaria and the emergence of market economies); Pub. L. No. 104-171, 110 Stat. 1539 (1996) (regarding Romania and the emergence of market economies); see generally FREEDOM Support Act, 22 U.S.C.A. § 5801 (West 1990); 50 U.S.C.A. app. § 2401-2404 (West 1991) (regarding technology export controls). During the late 1980s and 1990s, the President has repeatedly exercised his statutory power to grant MFN trading privileges to the P.R.C. and threatened to retaliate against unchecked copyright piracy, amid political controversies over how closely trading privileges should be linked to human rights performance, and whether intellectual property-related sanctions would be prudent. See 19 U.S.C.A. § 2242 (West Supp. 1998) (regarding P.R.C. and intellectual property); Freedom of Emigration in East-West Trade, 19 U.S.C.A. § 2432 (West Supp. 1998); Michael Yeh, Note, *Up Against a Great Wall: The Fight against Intellectual Property Piracy in China*, 5 MINN. J. GLOBAL TRADE 503 (1996); Lampton, *supra* note 4.

Moreover, the complicated and economically significant business of interpreting, administering, and enforcing the array of relevant U.S. statutes has entailed extensive and protracted contact among U.S. government lawyers and officials, their counterparts in countries subject to those laws, officers of U.S. and foreign companies seeking to do business in one another's jurisdictions, and private lawyers advising such companies about the requirements of compliance. Thus, foreign company officers' and foreign government officials' experiences in dealing with U.S. legal and regulatory structures in these contexts have been another channel for the transmission of information about U.S. laws, legal ideas, and practices, and, in some cases, for pressure to adopt or support legal reforms at home that emulate U.S. models.

Finally, in an era that has combined an explosion of access to information and a rising global interest in things American, it is reasonable to assume (and nearly impossible to prove) that considerable foreign importation of U.S. legal ideas and ideals has been occurring outside of any focused statutory framework, significant commercial transaction, public or private institutional contact, or formal program of legal advice and assistance. A striking illustration of this phenomenon is the consideration of U.S. court opinions in decisions by constitutional courts from Korea to Hungary.<sup>96</sup> Such "passive" export by the U.S., or "import without export" from the U.S., is another possibly important process of legal export that has coexisted with formal programs of legal advice and assistance to promote economic markets, democracy, and the rule of law abroad.

#### 2.1.4. *Devilish Details: An Illusion of Consistency and Coherence?*

There may be less than meets the eye in the seeming consistency of U.S. legal aid and advice programs' goals and the apparent consensus on law-related values among participants in formal U.S. assistance programs and in other channels for the export of U.S. legal ideas and ideals.

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<sup>96</sup> See Justice Imre Voros from The Constitutional Court of the Republic of Hungary, Speech at the *University of Pennsylvania Journal of Constitutional Law* Symposium (Mar. 21, 1998); Justice Yong-Joon Kim, President of the Constitutional Court of Korea, Address to the Faculty of the University of Pennsylvania Law School (Mar. 1998).

To the extent that aims and aspirations have been truly shared in principle, problems of practice still seem inescapable. Especially in the P.R.C., neighboring reforming or post-socialist states, and the former Soviet world, legal reforms compatible with economic marketization, political democratization or liberalization, and the rule of law have proceeded simultaneously and, at times, been pursued relatively rapidly. In such contexts, trade-offs have been inevitable (even if markets, democracy, liberalism, and the rule of law are fully compatible and mutually reinforcing in the long run). As a result, disagreements among U.S. providers of advice and proponents of U.S. models have been unavoidable on questions of sequencing, priorities, and responses to the costs of transition, even if and when they have subscribed to a common broad agenda. Thus, for example, many of the U.S. government programs appear to have emphasized a “checklist” of democracy-supporting legal institutional reform. Meanwhile, other U.S. advisors have attached a much higher priority to the legal reforms required for a rapid transition to economic markets. At the same time, some foundations (including the Soros network) early on gave a prominent place to legal assistance that strengthened civil society and voluntary organizations.

In addition, there has been substantial variety in the underlying motives and basic perspectives of some of the major U.S. players who have embraced the package of markets, democracy, liberalism, and “rule of law” values as the guiding principles of their activities in support of legal reforms in the post-Soviet world, China, and elsewhere. The philosophy of Karl Popper, for example, has been a proclaimed inspiration for the law-related and other work of the Soros Foundation-supported organizations. The most broad-ranging U.S. government programs, in contrast, have proceeded from the premise that legal reform to support democracy and rights serves U.S. foreign policy and security interests, a view typically based on some version of the theory of the democratic peace (democracies do not go to war with one another) and the theory of peace and prosperity through economic interdependence (extensive trade and investment relations permit the fuller exploitation of comparative advantage and economies of scale, and also increase the cost and decrease the benefits to a country of conflict with its economic partners). Human rights, economic development, and the promotion of free markets also seem to have been the core concerns that have led some organiza-

tions and individuals to endorse agendas that seemingly have included the full range of aims that have characterized contemporary U.S. legal advice and export efforts. With such a diversity of underlying perspectives, it would be remarkable if participants in the process had not come to define and interpret their seemingly shared goals in divergent and sometimes conflicting ways. The accounts (provided in later sections) of the legal advice U.S. sources have given and the aspects of U.S. legal models that have been exported suggest that, in this respect at least, the unexpected has not occurred.

Outside of the most wide-ranging foundation and public sector programs, there has been, at most, an incomplete overlapping consensus among advice providers and other participants in the enterprise of diffusing U.S. legal ideas and practices. For many, the agenda has been to promote legal reforms and legal transplants that are conducive to one— or some aspects of one— of the constellation of values that have animated various elements of the contemporary U.S. legal assistance and export drive. Such relatively narrow foci (for example, the legal requisites of economic markets) have sometimes meant indifference or even a degree of hostility toward suggestions or models that have been offered in service of other goals (such as the strengthening of legal mechanisms for holding government authorities accountable to popular will).

The degree to which U.S. providers of legal advice have not shared identical or even overlapping agendas may have been masked by the politics of funding for assistance programs. During the last decade or more, the “rule of law,” and, to a degree, “democracy” and “markets,” have become what “development” was in the 1960s and 1970s. They have become the magic words that those seeking resources for law-related aid or exchange projects have invoked— routinely and sometimes disingenuously— to enhance their chances of obtaining support from the federal government and major foundations.

Finally, recipient-country contexts often have proved inimical to coherence and consistency in the concrete aims or perceived agendas of U.S. assistance programs and other conduits for the transmission of U.S. legal models. The many nations that have been on the receiving end of these processes have varied dramatically in the degree to which U.S. assistance has benign or malign historical resonance; in the subsets of U.S. advice-providers or le-



gal idea merchants that they have been able to attract or willing to admit; in the character and aims of the local organizations with which U.S. lawyers, legal experts, and legal advisors have forged ties; and in the non-legal U.S. aid programs that have operated alongside U.S. legal assistance projects and other media for transmitting U.S. legal ideas. In such circumstances, even a pool of U.S. providers of advice and purveyors of U.S. ideals that was highly unified in its principles would look very differently at the operational level in individual countries.

## 2.2. *Some Cases: China and the Former Soviet Bloc*

Formal programs of legal assistance and other modes of legal export that have targeted two regions— China (and, to a lesser degree, other reforming socialist or authoritarian states in the region) and the nations of the former Soviet Bloc— are an appropriate focus for an assessment of the contemporary wave of U.S. legal export and aid efforts. The abandonment of socialist economic planning and orthodox Marxist-Leninist politics across an area that runs from the eastern edge of Western Europe to the western shores of the Pacific has triggered projects of legal reform of immense scale and obvious significance and brought a new openness to U.S. legal assistance and attempts to export U.S. legal models. No serious U.S. legal advice effort could fail to devote attention to these regions. Largely closed to earlier postwar attempts to provide U.S. legal assistance or to spread U.S. legal models abroad, these countries have become the most prominent recipients and the sources of the most distinctive challenges in recent years. To a considerable extent, the overall success or failure of U.S. legal aid and exports in the 1980s and 1990s depends on how well American advice and models meet the legal and law-related demands of political and economic reform in these vast “post-communist” systems.

Although countries in the former Soviet Bloc and the P.R.C.’s region have many atypical characteristics and needs, the U.S. programs that have extended legal assistance and the varied channels that have offered U.S. legal models for emulation in these regions also provide a fairly typical sample of more general patterns. They have addressed nearly the full range of substantive legal issues, and have operated in almost every institutional format, in the global repertoire of the U.S.-backed, and U.S.-based or

American-staffed enterprise of exporting legal models and providing legal advice.

Moreover, China, some of its neighbors, and the countries of the CEE/NIS region also differ considerably from one another in ways that embody many of the contrasts in recipient-country contexts that have confronted U.S. legal exporters and aid projects throughout the "non-Western" and "less developed" worlds. They vary, for example, in the character and vitality of their indigenous legal traditions, their relative distance from U.S. and other Western legal institutions and cultures, their degree of insulation from and resistance to legal and other foreign influences, and the pace and stage of their economic and political reforms.

Thus, a brief review of U.S. activities that have affected or sought to affect these countries covers much that is important to a general understanding of recent U.S. legal advice efforts and legal export processes, while also affording a moderately detailed consideration of program-specific, process-specific, or country-specific details that may help to reveal what factors have been conducive to success and failure in the recent overseas careers of U.S. legal models and U.S. legal assistance ventures.

### 2.2.1. *The People's Republic of China and other Asian Examples*

The most dramatic and high-profile type of contemporary U.S. efforts to export legal models or provide legal advice has been assistance in the drafting of new national constitutions. This form of U.S. advice and influence has not been a factor in China or in most of the other Asian states that have been wrestling with the problems of crafting legal and institutional arrangements for economic development and political reform. Building upon its 1978 predecessor, China's current constitution was adopted (essentially in its current form) in 1982, during the early years of the post-Mao reform era and before U.S. legal advice projects and other avenues for transmitting U.S. legal ideas had developed much of a presence in the People's Republic. Consolidating the reform-era leadership's repudiation of the radical late Cultural Revolution decade Constitution of 1975, the 1982 document was the product of a heavily domestic process that accorded no substantial role to U.S. or other outside providers of advice or expertise on constitutional questions.

The same general pattern holds for constitutional change in other reforming states in East and Southeast Asia. Cambodia has presented a modest, limited exception. The country's extreme political instability and extensive dependence on foreign economic assistance have made Cambodia especially open to the influence of international organizations and programs. Thus, it has been host, for example, to Asia Foundation seminars on constitutionalism and the U.S. Constitution<sup>97</sup> and to a USAID-funded ABA project providing technical advice on constitution drafting.<sup>98</sup>

U.S. programs of legal assistance and avenues for the export of U.S. legal models have been more prominent at the "sub-constitutional" level of efforts to build legal and law-making institutions. These institutions have seemed vital to the near-term consolidation of legality and effective government and to the longer term prospects for development of the rule of law or accountable and democratic government. Much of this work has focused on increasing the competence and autonomy of legislatures and fostering administrative decentralization. In the P.R.C., the Ford Foundation, for example, has given grants for projects designed to enhance the law-drafting competence of the Legislative Affairs Commission (the main law-drafting body under China's parliament). The Ford Foundation also has supported efforts to decentralize government through grants to aid in the drafting of a local government law and through educating elected officials on issues of administrative decentralization and effective local government.<sup>99</sup> The Asia Foundation has provided assistance to the State Council's Bureau of Legislative Affairs ("BLA") (an executive organization that is the principal drafter or co-drafter of most proposed legislation in the P.R.C.) in preparing anti-corruption legislation and local government reform, and to the

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<sup>97</sup> See Stephen P. Marks, *The New Cambodian Constitution: From Civil War to a Fragile Democracy*, 26 COLUM. HUM. RTS. L. REV. 45, 60 (1994).

<sup>98</sup> See ABA Website of International Law, *supra* note 22.

<sup>99</sup> See The Ford Foundation, 1996 *Annual Report: International Affairs* (visited Mar. 17, 1999) <<http://www.fordfound.org/AR.96/AR9660.html>> [hereinafter *Ford Foundation 1996 Annual Report: International Affairs*]; The Ford Foundation, 1995 *Annual Report: International Affairs* (visited Mar. 17, 1999) <<http://www.fordfound.org/AR.95/AR9514.html>> [hereinafter *Ford Foundation 1995 Annual Report: International Affairs*]; The Ford Foundation, 1994 *Annual Report: International Affairs* (visited Mar. 17, 1999) <<http://www.fordfound.org/AR.94/AR9414.html>> [hereinafter *Ford Foundation 1994 Annual Report: International Affairs*].

Ministry of Civil Affairs concerning methods for promoting lawful and orderly local-level elections.<sup>100</sup> A substantial United Nations Development Program ("UNDP") project, in which U.S. legal academics played prominent roles, has provided the BLA with extensive advice or training on topics including how to draft technically sound legislation, how to factor institutional, policy, and political environments into law-drafting, and how U.S. law has addressed administrative procedure in ways that might be instructive (but not prescriptive) for drafters of loosely analogous Chinese legislation.<sup>101</sup>

Broadly similar and sometimes more extensive programs have operated in nearby nations. The Asia Foundation, for example, has provided advice on establishing or reforming legislatures to sixteen countries in the region. These efforts have included a program for the National Assembly of Vietnam that offered training in techniques relevant to law-drafting and instruction about foreign models for structuring a legislature and its staff.<sup>102</sup> USAID's parliamentary programs have included support for Nepal projects that have offered orientation programs for members of parliament, advice concerning committee systems in legislatures, and help in the creation of a professional legislative secretariat staff.<sup>103</sup>

Much of the U.S. assistance directly concerned with the rule of law and law-related institutions has focused on the quality and autonomy of the bench and bar. Ford Foundation programs have sought "to strengthen the rule of law by supporting professional training."<sup>104</sup> Supported activities in the P.R.C. have included a

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<sup>100</sup> The Asia Foundation, *Programs in Asia: China* (last modified Nov. 6, 1998) <<http://www.asiafoundation.com/taf/programs/prog-asia-chin.html>> [hereinafter *Programs in Asia: China*].

<sup>101</sup> For accounts of the UNDP program, see Seidman & Seidman, *Drafting*, *supra* note 71, at 3-4; Ann Seidman & Robert B. Seidman, *The UNDP/BLA Project's Theoretical Foundation*, in LEGISLATIVE DRAFTING FOR MARKET REFORM 33 (Ann Seidman et al. eds., 1997) [hereinafter Seidman & Seidman, *The UNDP/BLA Project*].

<sup>102</sup> See The Asia Foundation, *Programs in Asia: Vietnam* (last modified Nov. 6, 1998) <http://www.asiafoundation.com/taf/programs/prog-asia-viet.html> [hereinafter *Programs in Asia: Vietnam*].

<sup>103</sup> See *Parliamentary Assistance in Nepal*, *supra* note 17.

<sup>104</sup> *Ford Foundation 1995 Annual Report: International Affairs*, *supra* note 99; see also *Ford Foundation 1994 Annual Report: International Affairs*, *supra* note 99 (describing grants to specialized Universities of Political Science and Law, and the "major commitment to China's leading law schools and to the

training center for senior judges,<sup>105</sup> university and government ministry programs to train trial court judges,<sup>106</sup> prosecutors and other lawyers, and projects by basic-level courts to improve the competence of judicial work.<sup>107</sup> The Foundation's grants have also provided funds for compiling case reports in a legal system that has lacked systematic reporters,<sup>108</sup> preparing and publishing texts by Chinese scholars addressing basic legal issues from a comparative perspective, and increasing the importance and efficacy of the legal system and legal institutions by enhancing access to legal services.<sup>109</sup> The U.S.-Asia Law Institute has provided fairly informal advice through exchanges with the P.R.C. Supreme People's Court concerning the preparation of laws that address the role of the judiciary and matters of judicial administration.<sup>110</sup> That institute and the Asia Foundation also have sought to strengthen the bar by working with the All China Lawyers' Association. The Asia Foundation's express goal in this area has been to promote the Chinese bar's insulation from domination by the Ministry of Justice.<sup>111</sup> U.S. sources have also supported work relating to the extensive reforms China has recently undertaken in its codes of substantive and procedural criminal law, including, for example, Ford Foundation funding for research on criminal procedure reforms and related human rights

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professional training of higher court judges and public prosecutors"); The Ford Foundation, *1993 Annual Report: International Affairs* (visited Mar. 17, 1999) <<http://www.fordfound.org/AR.93/AR9312.html>> [hereinafter *Ford Foundation 1993 Annual Report: International Affairs*].

<sup>105</sup> See *id.*

<sup>106</sup> See *Ford Foundation 1995 Annual Report: International Affairs*, *supra* note 99.

<sup>107</sup> See *Ford Foundation 1996 Annual Report: International Affairs*, *supra* note 99; *Ford Foundation 1993 Annual Report: International Affairs*, *supra* note 104; see also The Ford Foundation, *The Ford Foundation REPORT, Winter 1997 Volume 28 No.1* (visited Mar. 17, 1999) <<http://www.fordfound.org/QR.28.1/QR281toc.html>>.

<sup>108</sup> See The Ford Foundation, *The Ford Foundation REPORT, Summer 1993 Volume 24, No. 2* (visited May 11, 1999) <<http://www.fordfound.org/QR.24.2/QR24211.html>>.

<sup>109</sup> See The Ford Foundation, *The Ford Foundation REPORT, Summer-Fall 1995 Volume 26, No. 3* (visited May 11, 1999) <<http://www.fordfound.org/QR.26.3/QR263toc.html>> [hereinafter *Summer-Fall 1995 REPORT*].

<sup>110</sup> See Brown, *supra* note 24, at 24.

<sup>111</sup> See *id.*; *Programs in Asia: China*, *supra* note 100; *ABA Website of International Law*, *supra* note 22.

issues.<sup>112</sup> Broadly similar programs supported by a variety of U.S. organizations have operated in neighboring countries as well. For example, the ABA's USAID-supported Cambodia Law and Democracy Program has provided advice on implementing legal and judicial reform in the project's eponymous country.

The roles of U.S. legal models and legal advice programs have been more extensive and varied in China's efforts to build a legal framework to support a market-oriented economy. In the late 1970s, China's turn to economic reform and an "open door" toward international capital ushered in a new period of openness to a variety of channels for the transmission of legal ideas from U.S. sources. Since the early years of the Deng Xiaoping era, the U.S. lawyers' roles in providing advice on drafting laws and establishing legal institutions have gone, as one commentator put it, "hand in hand" with their professional participation in China's economic development program.<sup>113</sup> P.R.C. laws on foreign investment and trade have been a special focus of U.S. advice projects and other forms of attempted influence. Even the P.R.C.'s basic Law on Equity Joint Ventures, adopted at the dawn of the reform era, was a product of extensive analyses of other countries' joint venture laws and discussions with lawyers, government officials, and experts from several foreign countries, including the United States.<sup>114</sup> During the 1980s, the U.S.-China Business Council, individual U.S. firms and the U.S. embassy lobbied in favor of changes to make the P.R.C.'s foreign investment regime more liberal, transparent, and law-governed.<sup>115</sup> In recent years, U.S. experts have provided advice to Chinese officials on how to design a taxation system for foreign investors that would be maximally compatible with the legal treatment of foreign income under the

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<sup>112</sup> See The Ford Foundation, *The Ford Foundation REPORT Summer/Fall 1996 Volume 27, No. 3*, (visited May 11, 1999) <<http://www.fordfound.org/QR.27.3/QR273toc.html>>; see also *Summer-Fall 1995 REPORT*, *supra* note 109.

<sup>113</sup> Whitmore Gray, *The Challenge of Asian Law*, 19 FORDHAM INT'L L.J. 1, 6 (1995).

<sup>114</sup> See Walter Sterling Surry et al., *Joint Ventures in China: The First Water Stop*, 21 TEX. INT'L L.J. 221, 224 (1986) (describing western lawyers' involvement).

<sup>115</sup> See MARGARET PEARSON, *JOINT VENTURES IN THE PEOPLE'S REPUBLIC OF CHINA* 70-76 (1990).

tax laws of the U.S. and other major nations.<sup>116</sup> The Asia Foundation has supported a project in Shanghai to develop a commercial arbitration system that U.S. and other foreign investors and traders would find attractive.<sup>117</sup>

U.S. offers of legal assistance and attempts to promote broadly U.S.-style laws have addressed China's domestic economic laws as well. For example, U.S. lawyers, along with other foreign experts in Beijing, held discussions with the drafters of China's first bankruptcy law during the final phases of preparing the legislation that passed in 1986.<sup>118</sup> A proposed new bankruptcy law reportedly reflects a more thorough study of U.S. law.<sup>119</sup> Antitrust law has been another area of some activity in the 1980s and 1990s, with the Bush administration calling on China and other developing countries to adopt U.S.-style competition law.<sup>120</sup> In addition, the U.S.-Asia Law Institute has provided advice on labor law to the P.R.C.'s Ministry of Labor.<sup>121</sup>

Securities laws have been an increasingly important area for U.S. legal advice and export efforts. In this field, the U.S. role began with invited visits to China by Wall Street experts to explain the framework of U.S. capital markets.<sup>122</sup> The process continued and expanded through unofficial U.S. delegations (sometimes including SEC regulators) that have traveled to the P.R.C. to provide informal advice on securities regulation.<sup>123</sup> U.S. advice on

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<sup>116</sup> See Stephen C. Curley & Darren R. Fortunato, *Tax Considerations for Investors in China: A Preliminary Look*, 20 N.C. J. INT'L L. & COM. REG. 531, 533 (1995).

<sup>117</sup> See *Programs in Asia: China*, *supra* note 100.

<sup>118</sup> See Ta-Kuang Chang, *The Making of the Chinese Bankruptcy Law: A Study in the Chinese Legislation Process*, 28 HARV. INT'L L.J. 333, 335, 347 (1987) (describing western lawyers' involvement).

<sup>119</sup> See Shirley S. Cho, *Continuing Economic Reform in the People's Republic of China: Bankruptcy Legislation Leads the Way*, 19 HASTINGS INT'L & COMP. L. REV. 739, 755 (1996).

<sup>120</sup> See A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209 (1994).

<sup>121</sup> See Brown, *supra* note 24, at 22-24 (describing the role of the U.S.-Asia Law Institute in providing a channel for U.S. experts to exchange drafts of the 1995 Labor Law with the Chinese Ministry of Labor).

<sup>122</sup> See Nikos A. Stamos, *China's Nascent Securities Market: Some Observations*, 10 HARV. J.L. & PUB. POL'Y 691, 691 (1987).

<sup>123</sup> See generally Paul Gonson, *What I Did on My Summer Vacation*, INSIGHTS, Dec. 1990, at 21, 21-22 (SEC solicitor describing trip under auspices

P.R.C. securities laws has also included an undertaking set forth in a MOU between the SEC and its P.R.C. counterpart to provide help in drafting a wide range of securities laws and regulations, training for Chinese regulators in the P.R.C. or in the United States, and various forms of technical assistance.<sup>124</sup>

Intellectual property law has been another significant—and especially contentious—object of attempts to export U.S. models or win acceptance of standards acceptable to the United States in China's economic law. As early as the 1970s, P.R.C. delegations traveled to the United States and elsewhere to study foreign intellectual property laws in preparation for drafting new statutes for the P.R.C. Early drafts of the P.R.C.'s copyright law, adopted in 1990, were provided to the U.S. government for possible comment, and the drafting commission included an advisory role for foreign legal scholars.<sup>125</sup> In the 1990s, the United States relied on pressure, more than assistance, in its quest to influence the shape of China's intellectual property law. During the 1990s, three bilateral MOUs have emerged from a series of threatened sanctions and counter-sanctions following the identification of China as a serious violator of intellectual property rights under the "Special

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of People-to-People International to Hungary, Czechoslovakia, and Poland for the purposes of legal and economic reform).

<sup>124</sup> See Minkang Gu & Robert C. Art, *Securitization of State Ownership: Chinese Securities Law*, 18 MICH. J. INT'L L. 115, 123-24 (1996) (describing the cooperative relationship between the U.S. SEC and China as the first step in developing more market mechanisms and securities markets in China); U.S. SEC & P.R.C. Sec. Regulatory Comm'n, *Memorandum of Understanding Between the United States Securities and Exchange Commission and the China Securities Regulatory Commission Regarding Cooperation, Consultation, and the Provision of Technical Assistance*, 3 THE SEC SPEAKS IN 1995 195, 196-200 (1995), reprinted in CORPORATE LAW AND PRACTICE: COURSE HANDBOOK SERIES NUMBER B-882 (Practicing Law Institute ed., 1995) [hereinafter *Memorandum of Understanding*] (describing the United States-China MOU's goal of opening fair, efficient securities markets in China for market integrity and investor protection).

<sup>125</sup> See Chong Zheng Ren, *Copyright Law of China: Can It Effectively Protect U.S. Works?*, 16 LOY. L.A. ENT. L.J. 67, 70-71, 77-78 (1995) (describing the Chinese research of both civil law and common law systems in drafting Chinese copyright law); ZHENG CHENGSI & MICHAEL PENDLETON, COPYRIGHT LAW IN CHINA 65-75 (1991) (describing the drafting process of Chinese copyright law, including Chinese adherence to the two Sino-American treaties in the fields of science and foreign trade, as well as adherence to the two international copyright conventions (Berne and UCC)).



301” provision in the U.S. trade laws.<sup>126</sup> Under these accords, China has undertaken to adopt and enforce intellectual property laws that conform to the standards of the key international conventions that China pledged to join and to establish a U.S.-style customs-service to address some piracy problems.<sup>127</sup> In return, the U.S. agreed to provide training for some Chinese officers charged with enforcing intellectual property laws.<sup>128</sup>

In addition, the UNDP program on legislation, with many of its consultant and leadership roles filled by U.S. nationals offering some U.S. law-based advice and perspectives, assisted in the drafting of nearly two dozen major pieces of economic reform-related legislation.

Recent developments have pointed to the continuation and probably the expansion of programs and projects to provide U.S. advice and spread U.S. ideas to China. President Jiang Zemin’s 1997 visit to the United States yielded a new initiative for U.S. legal advice to China, especially in the field of commercial and economic law.<sup>129</sup> Less high-profile undertakings also have indicated that U.S. providers and funders have been considering agendas for future advice. For example, the Asia Foundation held a major conference of legal experts and P.R.C. economic policy-makers in Beijing to define the agenda of legal and judicial reforms necessary to continue progress in economic reform and foreign trade and investment beyond the mid-1990s.<sup>130</sup>

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<sup>126</sup> See Paul C.B. Liu, *U.S. Industry’s Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87, 112-13 (1994) (describing the 1992 China-U.S. MOU signifying a commitment to improved protection for U.S. copyrighted works).

<sup>127</sup> See Patrick H. Hu, “Mickey Mouse” in China: *Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT’L L.J. 81, 100-02 (1996) (discussing China’s unfulfilled pledge to create an effective intellectual property rights regime to address problems of copyright piracy, enforcement of copyright, and market access for those with copyright protection).

<sup>128</sup> See *id.* at 110-12 (describing U.S. “special seminars, exchange programs, mock proceedings, and other assistance to the Chinese media [which] result in long-term benefits for U.S. investments in China”).

<sup>129</sup> See Jim Mann, *U.S. and China Working to Get Beijing into WTO*, L.A. TIMES, Feb. 25, 1999, at C1.

<sup>130</sup> See generally Hu, *supra* note 127 at 110-12 (noting that the 1995 U.S.-China Intellectual Property Agreement calls for massive nationwide training of Chinese legal enforcement personnel); see also Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 26-34 (discussing the need for training of

Less structured and purposeful transmission to China of U.S. perspectives on economic law and information about U.S. economic laws has also proceeded steadily through educational channels. U.S. academics, practitioners, and judges have provided a good deal of instruction to Chinese lawyers and officials in aspects of U.S. and "international" economic law.<sup>131</sup> The fora have included the annual four-week programs of CLEEC's Center for American Law Study in China (which often included economic law foci), numerous short-term special seminars in the P.R.C. on trade, investment, and other subjects, and LL.M. or similar programs in China or in the U.S. with a business-law focus.

Like other types of U.S. legal aid and means for exporting U.S. legal models, U.S.-provided advice and ideas on economic law have extended to other nations in China's region as well. Examples of formal programs include the Asia Foundation's programs to provide Vietnamese institutions with materials on economic law and to give Cambodians intensive instruction in contract law.<sup>132</sup> With support from official and unofficial U.S. sources, those two countries and others in the region have also sent law students, legal scholars, and officials with economic law interests to the United States, albeit in numbers that do not rival China's.

Finally, in addition to channels for providing economic, constitutional, or "institutional" legal advice and pressing China to emulate U.S. models and norms in these areas, several avenues have developed for the export of general ideas about law and broad "rule of law" values from the U.S. to the P.R.C. A few initiatives, such as the "rule of law" programs of the State Department, USAID, the Ford Foundation, and the U.S.-Asia Law Institute/International Academy of Trial Lawyers, have included the

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judicial personnel, administrative personnel, and lawyers as a result of "[t]he legal nihilism of the Cultural Revolution").

<sup>131</sup> See Whitmore Gray, *The Challenge of Asian Law*, 19 FORDHAM INT'L L.J. 1, 5-8 (1995) (describing historically the migration of common law systems' ideas to China through U.S. law schools and through projects funded by the Ford Foundation, USAID, UN and the World Bank).

<sup>132</sup> See Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training*, 11 UCLA PAC. BASIN L.J. 221, 258 (1993); see also THE ASIA FOUNDATION, 1997 ANNUAL REPORT 12 (1997), reprinted in *The Asia Foundation, Reports and Publications* (visited Mar. 21, 1999) <<http://www.asiafoundation.org/taf/reports/rpt-annu.html>> (describing the Foundation's legal and economic policy training in Cambodia).

direct, or indirect, pursuit of such goals as part of their agendas.<sup>133</sup> Less purely “aid-like” efforts have been part of the mix as well, with the most notable example being the linkage, created by statute and briefly tightened by executive order, between China’s enjoyment of MFN privileges and performance on various human rights indicia that have included aspects of the rule of law.<sup>134</sup>

More commonly, the process of exporting these vague but fundamental values has been a side-effect (sometimes an intended or expected one) of advice and assistance programs that have focused on more concrete laws and institutions. Thus, for example, the American leader of the UNDP legislation-drafting assistance program for the P.R.C. has argued that the program’s “technical” training in law-making methods also served to promote the rule of law and democracy by requiring P.R.C. participants to consider the impact of proposed substantive rules on all affected social groups and especially the least well off.<sup>135</sup> Extended educational and professional contacts have sometimes had a similar effect without U.S. participants explicitly (or sometimes even consciously) having sought to “export” rule of law values. As U.S. law schools’, legal academics’ and law firms’ interactions with Chinese students, scholars, lawyers, and clients have grown rapidly—albeit to still-modest levels—from near-zero baselines in the 1970s, such ties have emerged as an additional channel for conveying relatively diffuse legal values. Anecdotal evidence suggests that much informal transmission of broad and general U.S. legal ideas and ideals has taken place in such contexts, sometimes through fairly self-conscious tutorials. In addition, U.S. foundation grants that have focused on strengthening the quality of Chinese law schools also have sometimes provided opportunities to convey the perceived virtues of U.S. law schools and the basic

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<sup>133</sup> See *Ford Foundation Regional Overviews*, *supra* note 27 (describing the Foundation’s efforts to assist local Chinese governments in drafting law, to train elected officials, and “to strengthen the rule of law by supporting the professional training of lawyers, judges, and prosecutors”).

<sup>134</sup> See W. Gary Vause, *Tibet to Tienanmen: Chinese Human Rights and United States Foreign Policy*, 42 VAND. L. REV. 1575, 1591-92 (1989) (linking, for example, future American arms sales in China in October 1987, to rectifying Chinese human rights violations in Tibet); Lampton, *supra* note 4.

<sup>135</sup> See Seidman & Seidman, *Drafting*, *supra* note 71, at 22-25 (written by the Chief Technical Advisors to the United Nations Development Program Project to assist China in drafting high priority law).

norms and modes of the legal thinking taught there.<sup>136</sup> Here, too, the pattern has not been limited to China. Some elements of this Chinese pattern have recurred to a lesser degree and on a smaller scale in some other countries in the region.

### 2.2.2. *Central and Eastern Europe and the Newly Independent States*

Offers of advice from U.S. providers and attempts to export U.S. models have greeted the wave of constitution-making that has swept Central Europe, Eastern Europe, and the Newly Independent States in the wake of the Soviet empire's collapse. In many countries in the region, framers of new constitutions (or of sweeping amendments to nominally continuing charters) have looked to elements of the U.S. model and have sought U.S. experts' input (or at least have appeared to welcome their suggestions). Through a variety of organizations and channels, U.S. legal academics and self-styled constitutional experts have offered constitutional counseling at a distance and also have hop-scotched across the fragments of the former Soviet empire to dispense advice on constitutions and constitution-making.

The single largest channel for such advice has been CEELI.<sup>137</sup> CEELI has arranged for U.S. lawyers and law professors to provide comments on one or more draft constitutions or sets of constitutional amendments from Albania, Bulgaria, Poland, Romania, Russia, Ukraine, and Uzbekistan. In several cases, CEELI also has provided in-country workshops on constitution-making.<sup>138</sup> In a similar vein, participants in the Federal Bar Asso-

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<sup>136</sup> See *Programs in Asia: China*, *supra* note 100 (describing the Asia Foundation's grant to aid Chinese legal reform, including sponsoring a Chinese delegation's travel to the United States and Europe "for a comparative study of administrative review procedures . . . part of a series of laws . . . being enacted in China to protect the rights of citizens and promote the development of an efficient and accountable bureaucracy").

<sup>137</sup> See American Bar Association, *Current Projects of the ABA: Section of International Law* (visited Mar. 1, 1999) <<http://www.abanet.org/intlaw/intlpro/current.html>> (stating that CEELI is an ABA section founded in 1990 and is devoted to developing free-trade and democratic legal infrastructure in these nations).

<sup>138</sup> See Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT'L & COMP. L. 155, 159 (1993); Ludwikowski, *supra* note 138, at 173-76 (concerning Lithuania); Eric Stein, *Post-Communist Constitution-Making: Confessions of a Comparativist*, 1 NEW EUR. L. REV., 421, 423-24 (1993) (describing American and other West-

ciation's Democracy Development Initiative have offered advice to constitution-makers in Eastern Europe.<sup>139</sup> The U.S. Chamber of Commerce even prepared a draft constitution for Bulgarian framers to consider.<sup>140</sup> Among the public sector programs, USAID, the State Department, and USIA have supported assistance from U.S. providers to constitution-makers in several countries in the region, including Ukraine, Romania, and Lithuania.<sup>141</sup> Building on personal or professional ties that predated the Soviet collapse or that arose accidentally in its aftermath, a few U.S. lawyers have played a visible, first-hand role in constitution-shaping processes in the Czech Republic, Lithuania, and Poland.<sup>142</sup> A modest number of CEE and NIS lawmakers and institutional reformers have also traveled to Washington to receive advice on constitutions, constitutionalism, and constitutional reform.

In these diverse formats, U.S. advisors have offered varied advice. Many have made specific prescriptions, including urging the adoption of U.S.-style constitutional provisions such as decentralized powers of judicial review, high barriers to constitutional amendment, or citizens' rights provisions that do not include explicit exceptions, conditions, or susceptibility to lawful suspension by government.<sup>143</sup>

Especially after the early wave of constitution-making when U.S. advice to constitution-makers crested in the first years of the post-Soviet era, U.S. programs to provide legal assistance and efforts to export legal models to the CEE/NIS region have addressed sub-constitutional issues, including the development of

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ern assistance to the Czech Republic and Slovakia in drafting of respective federal constitutions).

<sup>139</sup> See Lawrence, *supra* note 16, at 678.

<sup>140</sup> See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 460 (1991) (concerning Bulgaria).

<sup>141</sup> See CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE, *supra* note 15, at 51-57; Lawrence, *supra* note 16; 1998 Congressional Presentation, *supra* note 6.

<sup>142</sup> See, e.g., Elster, *supra* note 140, at 460 (1991) (concerning Bulgaria); Ludwikowski, *supra* note 138, at 173-76 (concerning Lithuania); Stein, *supra* note 140, at 423-24.

<sup>143</sup> See, e.g., Symposium, *supra* note 1, at 117-19 (concerning CEELI's role); Ludwikowski, *supra* note 138, at 179-84, 208-11 (concerning U.S. commentary on judicial review provisions in Ukrainian and other draft constitutions, and on rights provisions in the Albanian draft constitution); Stein, *supra* note 140, at 438-47 (describing U.S. participants' emphasis on the importance of a sparse and hard-to-amend constitution in the Czech drafting).

the institutional requisites of democracy and legality. Several projects have focused on legislatures. These include programs operated by USAID and, on a more modest scale, the Ford Foundation to provide or support technical assistance to legislators and law drafters in a few CEE/NIS states, most notably Poland.<sup>144</sup> Some U.S. government-funded parliamentary assistance flowed through the Frost Committee program for relatively "advanced" reformers in the region. In recent years, CEELI also has given more emphasis to assistance that has aimed to improve legislation-drafting and the legislative process. To this end, CEELI has supported training and technical assistance to CEE/NIS law-drafters. The Ford Foundation and other U.S. participants have cooperated with European Union sources in a CEE Parliamentary Practices Project that has supported technical training for regional parliamentarians (some of it provided by or under the leadership of U.S. experts).<sup>145</sup> There have been a number of more idiosyncratic single-country projects as well. For example, the International Republican Institute, operating with NED money, has run a program to instruct Romanians on the functions of a legislature in a democratic polity, rules of legislative procedure, and the operation of committee systems within a legislature.<sup>146</sup>

CEELI and other U.S. sources also have arranged for U.S. experts' commentary or advice concerning laws on legislation, regulation of lobbying and local government for countries in the region, especially Russia.<sup>147</sup> CEELI and USAID also have sought to advance democratic electoral reforms through supporting and facilitating U.S. providers' advice on election laws and on mechanisms for implementing and overseeing elections in several coun-

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<sup>144</sup> See *Ford Foundation 1995 Annual Report*, *supra* note 25; *Legislative Strengthening in Poland*, *supra* note 17 (regarding program dating to 1989).

<sup>145</sup> See QUIGLEY, *supra* note 31, at 74-78.

<sup>146</sup> See generally CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 15.

<sup>147</sup> See Central and Eastern European Law Initiative, American Bar Association, *CEELI's Activities in Romania (1991-98)* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/romania.html>> [hereinafter *CEELI in Romania*] (regarding legal reform and education in Romania); Central and Eastern European Law Initiative, American Bar Association, *CEELI's Activities in Russia (1992-98)* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/russia.html>> [hereinafter *CEELI in Russia*] (regarding lobbying and local government law for Russia).

tries in the CEE/NIS region, including Russia, Ukraine, and Central Asian republics.<sup>148</sup>

Many efforts to provide assistance or to export models have also aimed at reforming and strengthening judicial systems in the former Soviet areas. CEELI projects have provided advice or workshops on restructuring courts and adopting ethical standards and codes for judges and lawyers in several CEE and NIS states, ranging from Albania to Ukraine.<sup>149</sup> USAID has supported assistance in drafting codes of judicial ethics and projects to foster judicial independence in countries throughout the region.<sup>150</sup> CEELI, Ford Foundation grantees, the Judicial Conference of the United States, Soros Foundation-supported programs, and USAID-funded private voluntary organizations have undertaken projects to improve the quality of training for judges.<sup>151</sup> Such efforts have included support for local non-governmental or judge-run educational centers around the region (as well as, on occasion, Ministry of Justice-run schools).<sup>152</sup> These undertakings also have included direct provision of short-term training in judicial administration techniques or in particular areas of the law undergoing substantial reform including, for example, sessions on bankruptcy law for CEE judges and programs on commercial law, criminal law, and the jury system for Russian jurists.<sup>153</sup>

<sup>148</sup> See 1998 Congressional Presentation, *supra* note 6 (describing Central Asia program for training and technical assistance to electoral reform); USAID, *Democracy* (visited Mar. 30, 1999) <<http://www.info.usaid.gov/democracy>> (regarding the establishment of central election commission aid and the drafting of electoral law for Russia); *CEELI Website*, *supra* note 21.

<sup>149</sup> See Central and Eastern European Law Initiative, American Bar Association, *CEELI Programs* (visited Mar. 30, 1999) <<http://www.abanet.org/ceeli/programs.html>> (regarding Albania, Bulgaria, the Ukraine, and Romania, among other countries) [hereinafter *CEELI Programs*]; Central and Eastern European Law Initiative, American Bar Association, *Judicial Reform* (visited Mar. 30, 1999) <<http://www.abanet.org/ceeli/judicial.html>> [hereinafter *Judicial Reform*].

<sup>150</sup> See 1998 Congressional Presentation, *supra* note 6.

<sup>151</sup> See, e.g., *Judicial Reform*, *supra* note 149; Shullenberger, *supra* note 24, at 20 (describing the Vermont-Karelia Rule of Law Project, in which Associates in Rural Development and the Vermont Bar Foundation were USAID contractors, providing legal assistance to an entity within the Russian Federation).

<sup>152</sup> See CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 15, at 51-57 (regarding Romania).

<sup>153</sup> See Lawrence, *supra* note 16, at 678 (discussing the reintroduction of the jury system in Russia and the training of judges); Central and Eastern European Law Initiative, American Bar Association, *CEELI's Activities in Latvia (1992-98)* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/latvia.html>>

In addition, some initiatives have established connections between U.S. courts and judges and their CEE counterparts. Examples include USIA's "sister court" and "professional in residence" programs (the latter of which has sent U.S. jurists to CEE states),<sup>154</sup> and more ad hoc activities of U.S. federal judges who have traveled (sometimes repeatedly) to the region or welcomed CEE or NIS delegations on visits to their courts.<sup>155</sup> Some of the major providers, including CEELI and other USAID-backed programs, have also sought to foster the development of new or strengthened and more autonomous judges' associations and bar associations, with the goal of creating a more powerful and independent voice for the legal profession and the judiciary, as well as additional means for providing training to their members.<sup>156</sup>

Several projects have focused on other statutory and institutional supports for the rule of law. A few have emphasized advice on administrative law, including CEELI workshops for Hungary and ACUS workshops for Ukraine.<sup>157</sup> Other U.S. programs and providers have addressed efforts to reform criminal laws and

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[hereinafter *CEELI in Latvia*](regarding support for a judicial training center); Central and Eastern European Law Initiative, American Bar Association, *CEELI's Activities in Estonia (1992-95)* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/estonia.html>> [hereinafter *CEELI in Estonia*] (discussing the support for non-governmental judicial training centers in which judges provide training and support for judges' associations); Central and Eastern European Law Initiative, American Bar Association, *CEELI's Activities in Lithuania (1992-98)* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/lithuania.html>> [hereinafter *CEELI in Lithuania*] (same); *CEELI in Romania*, *supra* note 147 (regarding the support for education and training of magistrates); *COLPI Website*, *supra* note 30 (regarding COLPI's role in legal education, court reform, and judicial training); Bufford, *supra* note 53, at 459 (regarding bankruptcy training for CEE judges).

<sup>154</sup> See Lawrence, *supra* note 16, at 675-76.

<sup>155</sup> See Symposium, *supra* note 1, at 131-36.

<sup>156</sup> See Lydia Brashear, *A Year in the Balkans: Macedonia and the Rule of Law*, 24 WTR HUM. RTS. 18 (1997) (describing Rule of Law CEELI liaison work in Macedonia); Moxley, *supra* note 59 (describing CEELI programs in general); Symposium, *supra* note 1, at 118-21 (regarding judges' associations); *CEELI Website*, *supra* note 21 (discussing bar associations in NIS/CEE generally and the Baltics specifically); *Judicial Reform*, *supra* note 151 (same); 1998 *Congressional Presentation*, *supra* note 6 (regarding USAID's role in establishing CEE/NIS judges' associations).

<sup>157</sup> See Central and Eastern European Law Initiative, American Bar Association, *CEELI's Activities in Hungary (1992-98)* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/hungary.html>> [hereinafter *CEELI in Hungary*] (regarding CEELI Hungary workshop); see also Lawrence, *supra* note 16, at 677 (describing the ACUS Ukraine workshop).



prosecutorial institutions. These endeavors have included a collaborative CEELI-Department of Justice criminal law program that has offered assistance in legislative reform, implementation and enforcement techniques, and the training of prosecutors, lawyers and judges.<sup>158</sup> CEELI also has provided commentaries and concept papers on criminal procedure and substantive criminal law to several states in the region, while USAID and USIA have supported similar advice from U.S. providers.<sup>159</sup>

U.S. legal aid and export efforts targeting the former Soviet Bloc, thus, have paid much attention to the "political" and "government-institutional" dimensions of law reform. U.S.-supported and U.S.-provided advice and attempts to encourage the emulation of U.S. laws also have sought to support the development of legal frameworks for market-based economies in countries throughout the region. Some of these efforts have focused on commercial law, including much of the work of the Commerce Department's Commercial Law Development Program, CEELI's Commercial Law Program, and many discrete CEELI projects. Specific CEELI projects have included multiple sponsored visits by U.S. private and government lawyers specializing in commercial law, assistance with drafting commercial legislation (such as secured transactions laws for Latvia and Estonia), and advice to drafters of new civil codes and civil code reforms in the NIS and some Eastern European states.<sup>160</sup> Other endeavors have focused on business organizations law, including CEELI projects in Russia, Estonia, and Romania, and USAID-supported work on cor-

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<sup>158</sup> See Central and Eastern European Law Initiative, American Bar Association, *Criminal Law* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/crimlaw.html>> [hereinafter *Criminal Law*] (regarding CEELI-Department of Justice's program for reforming criminal law that includes support for drafting and implementing criminal legislation and training lawyers, judges, and prosecutors).

<sup>159</sup> See Lawrence, *supra* note 16, at 672 (regarding the 1992 CEELI program); 1998 Congressional Presentation, *supra* note 6; CEELI Website, *supra* note 21.

<sup>160</sup> See CLDP: Consulting and Training, *supra* note 46 (discussing seminars in international trade law and policy, customs, intellectual property, joint ventures, and government ethics); Moxley, *supra* note 59 (discussing CEELI Commercial law program); Central and Eastern European Law Initiative, American Bar Association, *Commercial Law* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/commercial.html>> [hereinafter *Commercial Law*]; Gonson, *supra* note 123, at 21 (discussing delegations of private and government lawyers); CEELI Programs, *supra* note 149 (regarding code drafting); 1998 Congressional Presentation, *supra* note 6 (same).

porate governance-related laws across the region.<sup>161</sup> U.S. advice-providers have addressed bankruptcy law and laws for the privatization of public enterprises. In this field, CEELI has provided advice and commentary on legislation in several countries, including Albania, Bulgaria, Estonia, Hungary, and Romania. Several USAID contractors have offered assistance to drafters in Armenia, Romania, and elsewhere in the CEE states. USIA has supported U.S. lawyers' and bankruptcy judges' visits and provided commentary on Western laws and practices to Russian drafters (particularly in the field of bankruptcy).<sup>162</sup>

Competition law and policy and capital markets-related laws arguably have been the areas that U.S. advice and export efforts have emphasized the most. Beginning in the early 1990s, the U.S. government pushed for antitrust law as a key element in the former Soviet Bloc states' transition to private ownership-based market-oriented economies. Primarily through programs operated jointly and separately by the Federal Trade Commission and the Justice Department's Antitrust Division, the United States has offered extensive advice favoring broad U.S.-style competition law. Such programs have provided legislation-drafting assistance, comments on existing local competition law, technical advice and training for regulators, instruction on the structure and operations of U.S. competition-regulating institutions and key legal-economic concepts in the field, and multipurpose advisory missions to many of the NIS and CEE states.<sup>163</sup> In addition, CEELI's

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<sup>161</sup> See *CEELI Website*, *supra* note 21 (discussing Russian business activity law and state support for small business law as well as Romanian small business law and laws on business enterprise and ownership reform); *1998 Congressional Presentation*, *supra* note 6.

<sup>162</sup> See *1998 Congressional Presentation*, *supra* note 6 (discussing Armenian and Romanian bankruptcy law); Lawrence, *supra* note 16, at 676 (discussing the role of the March 1993 USIA-backed U.S. lawyers' and bankruptcy judges' visits to Russia and the provision of written commentary on Western practices to Russian drafters); *CEELI Website*, *supra* note 21 (mentioning modification of bankruptcy laws throughout the region).

<sup>163</sup> See Roger W. Mastalir, *Regulation of Competition in the "New" Free Markets of Eastern Europe: A Comparative Study of Antitrust Laws in Poland, Hungary, Czech and Slovak Republics, and Their Models*, 19 N.C. J. INT'L L. & COM. REG. 61, 62 (1993) (arguing that antitrust policy in Poland should focus on horizontal, not vertical monopolies); A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 HOUS. J. INT'L L. 311, 328-37 (1996); Waller, *Neo-Realism*, *supra* note 24 (describing DOJ's competition policy technical assistance programs and FTC-DOJ Competition and Consumer Protection Technical Assistance Program); Byrne & Schrag, *supra*

experts have provided commentary—often reflecting the values of U.S. antitrust law—on draft antitrust laws for Bulgaria, Romania and other states in the region.<sup>164</sup> An ABA task force and the Association of the Bar of the City of New York have provided advice on harmonization of competition law to former Soviet Bloc states.<sup>165</sup>

USAID has supported numerous programs—including those operated by the SEC—to establish or improve stock exchanges, securities and exchange commissions, clearance and settlement organizations, and substantive laws and regulations essential for operational capital markets.<sup>166</sup> The SEC has offered aid and advice to drafters of securities laws and regulations and to stock exchanges, OTC systems, and a variety of SEC-like regulatory bodies in Bulgaria, Hungary, Poland, and other CEE countries.<sup>167</sup> Much of the SEC's work in these areas has been conducted through the International Institute for Securities Market Development. Several of its major efforts (in some cases in conjunction with the Treasury and Commerce Departments) have focused on Russia.<sup>168</sup> CEELI has arranged advice from U.S. private and government experts in securities law for several states in the region.<sup>169</sup>

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note 52, at 456-59 (discussing Convention on the International Sale of Goods and antimonopoly law); McDermott, *Competition Counseling to Eastern Europe*, *supra* note 42; see also Lawrence, *supra* note 16, at 678 (discussing FBA's Democracy Development Initiative).

<sup>164</sup> See generally CEELI Programs, *supra* note 149.

<sup>165</sup> See Waller, *Neo-Realism*, *supra* note 24; James Langenfeld & Marsha W. Blitzer, *Is Competition Policy the Last Thing Central and Eastern Europe Need?*, 6 AM. U.J. INT'L L. & POL'Y 347, 348-49 (1991).

<sup>166</sup> See 1998 Congressional Presentation, *supra* note 6 (discussing the CEE/NIS region generally and Russia specifically).

<sup>167</sup> See Doty, *SEC Perspective*, *supra* note 43, at 12-47; see generally United States Information Agency, *News Releases*, (visited Mar. 15, 1999) <<http://www.usia.gov/usiahome/releases/newrels.htm>> (describing the independent foreign affairs agency's work in conducting legal educational exchanges abroad).

<sup>168</sup> See Securities and Exchange Commission, *Technical Assistance: International Affairs*, SEC 1997 ANNUAL REPORT (visited Mar. 15, 1999) <<http://www.sec.gov/asec/annrep97/annrep97.htm#intl>> (describing the SEC partnership with USAID in the former Soviet Union and Central and Eastern Europe to provide technical assistance to newly forming regulatory agencies and stock exchanges).

<sup>169</sup> See Gonson, *supra* note 123, at 21-22 (describing a delegation of securities, corporate, and banking lawyers which gave advice and assistance to Hungary, Czechoslovakia, and Poland); Moxley, *supra* note 59 (discussing CEELI); *Commercial Law*, *supra* note 160 (noting particularly the establishment of

USAID and CEELI also have undertaken or supported advice on banking laws and other financial institutions laws for some of the former Soviet Bloc states where economic reform efforts have gone relatively far.<sup>170</sup>

U.S. providers of advice and funders of aid also have offered support for CEE/NIS moves to create legal regimes attractive to foreign investors and trading partners (although these areas of substantive law have held a less central place than in U.S. efforts to affect legal development in China). For example, many of the seminars operated by the Commerce Department's Commercial Law Development Program have focused on trade law and policy, customs regulations, binational joint ventures, protection of intellectual property, and prevention of corruption among government officials.<sup>171</sup> For another example, CEELI has provided background papers on international trade and foreign investment law for some CEE states, including Poland and Bulgaria.<sup>172</sup>

Alongside programs that have addressed constitutions, economic and other legislation, and the capacity of particular legal and governmental institutions, the U.S. funders' and providers' attempts to export legal models and provide legal advice also have addressed more abstract and less immediately programmatic ideas about law and the rule of law. Many of the major participants—including the U.S. government's various "rule of law" initiatives, the Ford Foundation's "rule of law" programs, CEELI's sprawling endeavors, and Soros' "Open Society Institutes"—have placed such aims in program titles and mission statements that, at least in principle and sometimes in practice, have informed and guided their projects to offer concrete legal advice and assistance. Some of these organizations' undertakings have focused explicitly and

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Commercial law Centers, which are legal resource libraries, in Poland, Lithuania, and Bulgaria).

<sup>170</sup> See *Commercial Law*, *supra* note 160; U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, *Regional Activities in Central Europe, available in 1998 Congressional Presentation*, *supra* note 6 (discussing banking law reform).

<sup>171</sup> See *Commercial Law Development Program*, *supra* note 18.

<sup>172</sup> See Central and Eastern European Law Initiative, American Bar Association, *CEELI's Activities in Poland (1991-98)* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/poland.html>> [hereinafter *CEELI in Poland*]; Central and Eastern European Law Initiative, American Bar Association, *CEELI's Activities in Bulgaria (1991-98)* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/bulgaria.html>> [hereinafter *CEELI in Bulgaria*].

directly on the promotion of such values and principles. U.S. government agencies, led by the State Department, and sometimes in collaboration with host-country institutions, have run "rule of law" seminars and have sponsored trips by dozens of U.S. lawyers and judges to the NIS and CEE states under the rubric of "rule of law" programs. Additionally, USIA has provided "seed money" for the preparation of books on the rule of law for readers in the CEE region.<sup>173</sup>

Major private foundations have run educational and broadly education-related programs with a strong, sometimes explicit, message favoring the rule of law and the revival or strengthening of cultures of legality. The Ford Foundation has supported efforts to revitalize legal studies and other social sciences in the CEE and NIS region and sponsored a series of multiple-week "Raising Rights Consciousness" programs held in Hungary and organized jointly by a local foundation and a U.S. law school for law professors from across the region.<sup>174</sup> Soros organizations have been quite active as well, including the Central European University, which has provided legal education and supported legal research, and COLPI, which has collaborated with local Open Society Institutes and Foundations to translate English language law books and to provide enrichment programs for law students, professors, librarians, and clinicians. COLPI also has supported publications that have monitored and reviewed constitutional and legislative developments in the region.<sup>175</sup> Sometimes under the banner of "civil society" programs that became prevalent in the middle 1990s, Soros, other U.S.-based foundations, and, to a lesser degree, USAID, have focused on supporting the development of

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<sup>173</sup> See, e.g., Bufford, *supra* note 53, at 465 n.29 (describing in detail the USAID program in ten nations of Eastern Europe, including writing summaries of existing bankruptcy law, presenting the conclusions, and providing judicial training seminars to facilitate improvement); U.S. Agency for International Development, *1995 Annual Performance Report* (visited Mar. 30, 1999) <<http://www.dec.org/usaideval/poatoc2.htm>> [hereinafter USAID 1995 AR]; Lawrence, *supra* note 16, at 673 (noting that since 1990 the USIA has earmarked over \$60,000,000 in its Rule of Law program through its program in SEED).

<sup>174</sup> See Ford Foundation, *Russia and Central Europe: Creating a New Generation of Professionals* (visited Mar. 22, 1999) <<http://fordfound.org/qtr24.2/qtr2428.html>>.

<sup>175</sup> See COLPI Website, *supra* note 30 (stating that COLPI's book projects have been especially active in Russia and COLPI's enrichment programs have been especially active in Bulgaria).

indigenous, recipient-country NGOs that have pursued "rule of law"-related agendas (including, for example, human rights, minority rights, freedom of the press, and mechanisms of government accountability).<sup>176</sup>

Although "rule of law"- and "legality"-focused programs have been relatively numerous and prominent, much of the export trade in U.S.-style notions of legality and the rule of law doubtless has occurred as a side-effect of activities that have not explicitly or consciously sought to instill such values or that have not defined themselves as part of any effort to support law reform or legal transplants. Examples of the former include the many projects to provide advice on economic law, criminal law, judicial administration, and the like which either have operated under fairly narrow mandates or through specialized organizations that have not articulated a broad democracy-markets-rule-of-law agenda or have not been deeply imbued at an operational level with their umbrella or parent organization's official ideologies.

Examples of the latter include many "non-aid" avenues for the transmission of legal ideas. One such mode has been through the interaction of CEE/NIS officials, business people, and lawyers with U.S. government officials on issues ranging from access to U.S. government-dispensed trade privileges and investment insurance to NATO expansion. Often conducted in the shadow of blunt "rule of law"-related conditions on U.S. cooperation and support, such exchanges have given CEE/NIS participants repeated and sometimes intense exposure to U.S.-style legal analysis and notions of legality. Another significant informal pathway for the transmission of U.S. legal ideals has run through U.S. lawyers and business people who have participated in the international trade and investment deals that have become an important force in CEE and NIS economic reform and development, and who (consciously or not) have conveyed to their local counterparts their own picture of the importance and the contours of a stable, predictable, law-governed order. Another example of an informal but potentially influential channel is the growing number of CEE/NIS citizens who have been scholars, students, or visitors at U.S. law schools.

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<sup>176</sup> See QUIGLEY, *supra* note 31, at 73; CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 15, at 57-74.

### 2.3. *Processes and Providers: Evidence from China and the Former Soviet Bloc*

During the last decade or more, diverse “exporters” and advisors have resorted to a wide variety of processes to transmit U.S. legal ideas and extend U.S. legal assistance to China, the former Soviet Union, and neighboring states. Some of this variety is evident in the many roles that transactional lawyers, government officials, business people, law school professors, and law students have played in the informal dissemination and cultivation of U.S. and U.S.-style laws and legal ideals outside the context of formal aid and advice programs. The recent history of bilateral negotiations and the largely unilateral implementation of U.S. laws that address foreign states’ laws and behavior (or that otherwise seek extraterritorial effect) reflect a different type of “exporter” or “advisor” employing different methods for influencing the laws and legal systems of targeted countries.

Considerable diversity of processes and providers also has characterized the narrower— but central— range of activities undertaken by organized programs and projects that have focused primarily and explicitly on providing legal aid and advice to the countries of the CEE/NIS region, the P.R.C., and other states in its region. Like the “non-aid” and “non-advice” channels for the export of U.S. legal models, such U.S. programs and projects involving U.S. participation have varied widely in format and duration, in the degree of detail and the distinctly “American” content of their advice, and in the training and expertise of the individuals and organizations that have been the immediate dispensers of assistance.

#### 2.3.1. *Duration and Format*

As the U.S. securities lawyers’ journey to Mongolia illustrates, much of the effort to export U.S. legal models and to extend U.S. legal assistance to the P.R.C. and the ex-Soviet world has taken the form of short-term visits by U.S. experts, whether drawn from the bar, the legal academy, or federal agencies and courts. The resumes, personal web pages, and semi-autobiographical articles of hundreds of law professors, think-tank scholars, government attorneys, and private practitioners are dotted with references to having provided advice (or even serving as a ghost-writer) to lawmakers in countries that range from China and Russia to the most obscure of former Soviet Republics. Organized and

supported by a host of government entities, foundations, and voluntary organizations, these efforts to provide assistance typically have taken the form of meetings, lectures, or seminars in recipient countries.

A few examples suggest the range and variety of such undertakings. Countless U.S. practicing lawyers, government officials, and legal academics have journeyed individually and in small groups to CEE and NIS states, sometimes under quite informal and ad hoc arrangements, to provide a few days to a few weeks of advice on everything from constitution-drafting, the rule of law, and processes of constitutional and administrative adjudication to securities, corporations, banking, and bankruptcy law.<sup>177</sup> CEELI has arranged hundreds of workshops, seminars, and short-term placements that have brought U.S. and Western European experts to NIS and CEE states for a few days to discuss topics that have included constitution-making, legislative drafting, alternative dispute resolution, judicial ethics, bankruptcy, secured transactions, foreign-domestic joint ventures, and the Convention on the International Sale of Goods.<sup>178</sup> U.S. law schools and foundations, often in cooperation with Chinese institutions, have brought U.S. lawyers and academics to China to provide short courses for government regulators and scholars on such subjects as foreign trade and investment, the legal and judicial requisites of continued economic reform, and other selected legal topics.<sup>179</sup> More informally, U.S. and P.R.C. organizations also have arranged for U.S. schol-

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<sup>177</sup> See, e.g., Ludwikowski, *supra* note 138, at 159-218 (describing workshops and other short-term modes of advice on constitution-drafting provided to CEE and NIS states); Belcuore, *supra* note 23, at 461 (describing FBA DDI's "talent" bank for providing advice on a wide array of legal subjects); Gonson, *supra* note 123, at 21 (describing a two-week advice-providing trip to Poland, Hungary, and the Czech Republic by delegation of U.S. government and private lawyers with expertise in securities, corporate, and banking law); Byrne & Schrag, *supra* note 52, at 457 (describing a one-week course by a Georgetown professor on constitutional adjudication for Estonian justices); John J.A. Burke, *The Economic Basis of Law as Demonstrated by the Reformation of NIS Legal Systems*, 18 LOY. L.A. INT'L & COMP. L.J. 207 (1996); Lawrence, *supra* note 16, at 678 (regarding FBA DDI's 1992 delegation to Russia and Kazakhstan which included the Solicitor General, the FBA Chairman, administrative law judges, lawyers, and academics).

<sup>178</sup> See CEELI Website, *supra* note 21.

<sup>179</sup> See Edwards, *supra* note 73, at 303; *Programs in Asia: China*, *supra* note 100 (regarding the 1995 Conference in Beijing on legal and judicial requisites of continued economic reform and foreign trade and investment); see also *infra* note 193 (discussing the AAX program).



ars and lawyers, who have been in China for other purposes, to present lectures on topics within their expertise to Chinese legal and legal-academic audiences.

On the government side, the State Department's rule of law program has brought together hundreds of officials each year from the United States and recipient countries at one-week to two-week conferences.<sup>180</sup> USAID-sponsored parliament-strengthening initiatives have supported two-to-three day meetings of CEE and Western legislators at CEE sites.<sup>181</sup> USIA and ACUS have sent federal judges and other U.S. officials on short-term visits to former Soviet Bloc states, China, and neighboring Asian states to provide advice on the rule of law, judicial institutions, and related topics.<sup>182</sup> USAID contractors have run seminars and meetings on a variety of economic law topics in CEE states, both unilaterally and in conjunction with local entities.<sup>183</sup> USAID-supported collaborative efforts by the FTC and the Justice Department's Antitrust Division have dispatched staff lawyers, economists, and more senior agency officers to provide competition law and policy advice to former Soviet Bloc states.<sup>184</sup> The SEC and the Justice Department's Criminal Division (in some cases in collaboration with CEELI) have used similar formats to provide advice in their respective areas of expertise, prin-

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<sup>180</sup> See USIA International Exchange 1995, *supra* note 12; USIA International Exchange 1994, *supra* note 12.

<sup>181</sup> See Hal Lippman & Joel Jutkowitz, *CDIE Impact Evaluation: Legislative Strengthening in Poland* (visited Mar. 1, 1999) <<http://www.dec.org/usaaid eval/>>.

<sup>182</sup> See Lawrence, *supra* note 16, at 677 (describing ACUS officials' and federal judges' 1993 trip to China and the ACUS/USIA program that sends U.S. judges to Southeast Asia).

<sup>183</sup> See Bufford, *supra* note 53, at 460 & nn.6-7 (describing the USAID and Romanian government co-sponsored seminars for Romanian bankers, government officials, and judges, and USAID's contract with Deloitte & Touche to present more than 20 week-long seminars for East European judges on bankruptcy).

<sup>184</sup> See Spencer Weber Waller, *Comparative Competition Law as a Form of Empiricism*, 23 BROOK. J. INT'L L. 455 (1997) [hereinafter Waller, *Comparative Competition Law*]; Langenfeld & Blitzer, *supra* note 165, at 348; McDermott, *Competition Counseling to Eastern Europe*, *supra* note 42, at 4 (describing how the Department of Justice Antitrust Division and the FTC received a grant from USAID to provide competition counseling over a three-year period to Eastern European countries and how the Assistant Attorney General for the Antitrust Division led a presidential delegation in 1990).

cipally to the former Soviet areas.<sup>185</sup> The Commerce Department's Commercial Law Development Program, the Justice Department's criminal law reform programs for the CEE and NIS, the Justice/FTC effort on competition law, and a UN-sponsored project on legislative drafting for China all have arranged for relatively short-term, several-week placements of U.S. lawyers as visiting advisors in recipient countries.<sup>186</sup>

As the American law professor's proposed constitution for the post-Soviet Republic of \_\_\_\_\_ illustrates, a second common mode for exporting U.S. legal ideas and offering U.S. legal advice has been to provide assistance at a distance. Perhaps the most prominent example of this format has been CEELI's arrangement for U.S. experts in relevant fields of U.S. law to provide "comments" on draft laws and constitutions of NIS and CEE states and "background papers" on general fields of law for individual countries in the region.<sup>187</sup> U.S. government agencies have employed similar formats, especially on questions of economic law and regulation. The Department of Justice and the FTC home offices have provided on-going advice on antitrust law and the regulation of competition, through a process that appears not to have relied primarily on extended or regular engagements in the recipient countries.<sup>188</sup> The SEC, advised by a panel of representatives of leading financial market firms and organizations, has offered similarly "remote" technical and law-drafting assistance to securities-market regulators in the former Soviet Bloc and China (pursuant to a bilateral MOU) and several other nations in the developing world.<sup>189</sup> Also, USIA has supported a number of informational projects including, for example, a book on Western bankruptcy laws, practices, and procedures for Russia.<sup>190</sup>

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<sup>185</sup> See Doty, *SEC Perspective*, *supra* note 43, at 117 (describing SEC staff visits to advise CEE counterparts on regulating emerging securities markets); *Criminal Law*, *supra* note 158.

<sup>186</sup> See *Criminal Law*, *supra* note 158; Waller, *Comparative Competition Law*, *supra* note 184; *Commercial Law Development Program*, *supra* note 18; Seidman & Seidman, *Drafting*, *supra* note 71.

<sup>187</sup> See, e.g., Ludwikowski, *supra* note 138, at 167 (describing CEELI commentaries on CEE and NIS constitutions). See generally *CEELI Website*, *supra* note 21.

<sup>188</sup> See McDermott, *Competition Counseling to Eastern Europe*, *supra* note 42, at 4; Doty, *SEC Perspective*, *supra* note 43, at 126 (describing the Emerging Markets Advisory Committee).

<sup>189</sup> See *Memorandum of Understanding*, *supra* note 124, at 197.

<sup>190</sup> See Lawrence, *supra* note 16, at 676.

A third, widely used structure for providing U.S. legal advice and exporting U.S. legal ideas has been relatively brief visits, courses, and seminars hosted by U.S. providers for regulators, judges, and lawyers from China, the NIS, and CEE countries. These short-term programs have been quite varied, as a few examples illustrate. Since the early days of China's now twenty-year-old reform era, P.R.C. drafters of key economic laws (and especially those addressing foreign investment-related issues such as intellectual property law) have undertaken occasional, brief missions to the United States and elsewhere in the West to gather information and informal advice.<sup>191</sup> In the 1990s, ad hoc exchanges and training in the United States for Chinese visitors have expanded to include several-day sessions on topics ranging from judicial administration to labor law.<sup>192</sup>

More formally, the ABA's ILEX exchange program (which dates to 1968), the Ford Foundation, the Asia Foundation (partly through its Asian American Exchange Program), a UN-funded U.S. law-school administered project, and others have arranged for lawyers and officials from the CEE/NIS region and from China and neighboring developing and reforming states to come to the United States for programs (sometimes individually tailored ones) in which American (and other) experts have offered advice on such topics as human rights, training for legislators and judges, and securities laws.<sup>193</sup> Especially through its sister law schools programs and related visits by CEE law deans, CEELI has provided for U.S.-based exposure to, and training in, the organizational structure and educational methods of U.S. law schools; Recently, law deans from the P.R.C. have been provided with similar advice and exposure during group visits to a series of U.S. law schools.<sup>194</sup>

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<sup>191</sup> See Edwards, *supra* note 73; Maria C.H. Lin, *The Patent Law of the People's Republic of China*, 405 PLI/COMM 149, 153 (1986) (concerning the delegations sent abroad in the 1970s); Ren, *supra* note 125.

<sup>192</sup> See Brown, *supra* note 24, at 22.

<sup>193</sup> See Sidel, *supra* note 132, at 258 (discussing the Asia Foundation's support of Vietnam's economic law development and the Ford Foundation's support for human rights programs); Asia Foundation, *Asian-American Exchange* (visited Feb. 22, 1999) <<http://www.asiafoundation.com/taf/programs/prog-us.html>> (discussing the AAX Program); *ABA Website of International Law*, *supra* note 22 (regarding ILEX exchange programs, briefing trips, and seminar programs for legal professionals around the world).

<sup>194</sup> See Central and Eastern European Law Initiative, American Bar Association, *Legal Education* (visited Mar. 30, 1999) <<http://www.abanet.org/ceeli>>

This mode of short-term assistance and training in the United States has been a common format for U.S. government programs as well. For example, USAID's parliament-strengthening initiative has included two-to-three week training courses by congressional and agency staff for professional legislative staffers from Poland.<sup>195</sup> Delegations of P.R.C. officials have come to the United States to meet with U.S. administrative law academics.<sup>196</sup> U.S. federal courts have run programs in Washington for CEE judges and administrators, and the National Judicial Center's training facility for judges has brought in as many as a hundred foreign jurists per year (including a significant number from Russia) as students or observers. The Commerce Department's CLDP program has run a Washington-based, week-long or multi-week series of seminars that have provided instruction in a variety of trade and investment-related legal fields to lawyers from the CEE/NIS region, and the FTC has hosted visits by CEE officials to discuss draft competition laws and competition policy more generally.<sup>197</sup> The SEC has operated a series of one-to-two week seminars providing technical assistance and instruction in the development and oversight of securities markets to a hundred or more regulators who have come to Washington each year from the former Soviet world, East Asia and other emerging market countries.<sup>198</sup> The SEC has undertaken to provide U.S.-based training for Chinese securities regulators.<sup>199</sup> The U.S. government also has established a similar technical assistance arrangement for Chinese intellectual property administrators.

U.S.-provided advice and the promotion of U.S. legal models have not been limited to single-iteration, or short-term endeavors. Several more sustained formats for offering assistance and

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/legaled.html> [hereinafter *Legal Education*]; LAW QUADRANGLE NOTES, *supra* note 76, at 33.

<sup>195</sup> See Lippman & Jutkowitz, *supra* note 181, at 10.

<sup>196</sup> See Lawrence, *supra* note 16, at 677.

<sup>197</sup> See *Commercial Law Development Program*, *supra* note 18. See e.g., Langenfeld & Blitzer, *supra* note 165, at 391 (regarding Bulgarian competition politicians' visit to the U.S. FTC).

<sup>198</sup> See Doty, *SEC Perspective*, *supra* note 43, at 126; The U.S. Agency for International Development, *Welcome to USAID* (visited Mar. 30, 1999) <<http://www.info.usaid.gov>> [hereinafter *USAID Website*]; Securities and Exchange Commission, *SEC 1996 Annual Report* (visited Mar. 30, 1999) <<http://www.sec.gov/asec/annrep96/cont96.htm>>.

<sup>199</sup> See *Memorandum of Understanding*, *supra* note 124, at 197-98.

transmitting legal ideas have been in the repertoire as well. Many of the academics, practitioners, officials, and judges who have made brief trips to the former Soviet region or to China and its neighbors have undertaken numerous, frequent advice-providing missions to the same places.<sup>200</sup> CEELI's processes of providing comments on draft legislation, the U.S. government's programs offering competition law and policy assistance, and other U.S.-based efforts to render aid at a distance often have involved fairly sustained engagement, with advice being given either on an ongoing basis or in sequential reviews of multiple draft laws addressing the same subject. Some U.S.-based training programs for CEE/NIS and P.R.C. lawyers, judges, law-drafters, and other officials have been fairly long-term. Examples include a CEELI faculty training program that has brought academics from the former Soviet world to the United States for extended periods and a similar program for Chinese scholars operated by CLEEC. A UNDP program for China also included a one-semester stint at Boston University for Chinese law-drafters as part of a longer-term P.R.C.-based training and consulting program that sought, among other things, to "train trainers" who would be able to perpetuate the influence of the U.S. instructors' initial direct teachings. Under a bilateral MOU, the U.S. Patent Office has received staffers from its P.R.C. counterpart for several-month training programs.<sup>201</sup>

Some of the major institutional participants in U.S. legal assistance and export efforts have attempted to give greater continuity and coherence to the projects they support by posting program officers or staff coordinators in recipient countries for a year or more. In the P.R.C., for example, the Ford Foundation's resident office has long included a legal program officer who has typically held the post for two or more years, overseeing Foundation-funded programs, and assisting recipients of Foundation grants. In the former Soviet world, CEELI has been sending young lawyers to approximately twenty countries to serve for one to two years as "resident liaisons" who work with governments, bench

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<sup>200</sup> See Symposium, *supra* note 1, at 131 (quoting statements of Judge Patricia Wald regarding her numerous trips abroad); Barbara A. Perry, *Constitutional Johnny Appleseeds: American Consultants and the Drafting of Foreign Constitutions*, 55 ALB. L. REV. 767, 777, 779 (1992) (citing trips made by Judge Alex Kozinski, Professor Albert Blaustein, and Professor A.E. Dick Howard).

<sup>201</sup> See Edwards, *supra* note 73, at 308-09.

and bar organizations, and educational institutions to coordinate requests for CEELI assistance and in-country aspects of CEELI projects. The Soros Foundation-supported, national-level Open Society Institutes, which have included some law-related activities on their agendas, typically have begun with a representative sent out from the United States who remained in residence during a local OSI's early phases. USAID-funded programs—including, for example, parliamentary/legislative advice programs in Poland and Nepal—have been coordinated by officers who are posted in the recipient country and work with the local U.S. embassies (although some critics have derided USAID offices as “bubble colonies” that have been fatally isolated from the hostcountry environment).<sup>202</sup> Some assistance efforts, particularly those supported by the Ford Foundation (and to a degree USAID) have achieved greater programmatic continuity and consistency through policies of sustained cooperation with specific legal educational institutions and law-related NGOs in recipient countries.

In addition, several programs regularly have sent individual U.S. providers of legal advice and assistance to recipient countries for periods of several months or longer. USIA's professional-in-residence program, for example, has placed judges and others with legal expertise in the countries of the former Soviet Bloc and the developing world for up to a year. A USAID-funded program of the FTC and the Justice Department's Antitrust Division has assigned lawyers and economists for six months or more to provide on-site advice to CEE states on competition law and policy.<sup>203</sup> The Justice Department has operated a similar program in the field of criminal law. CEELI has dispatched legal specialists (who have had more experience as lawyers and more expertise in a particular subject than CEELI resident liaisons have had) to NIS and CEE states for up to one year.

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<sup>202</sup> See QUIGLEY, *supra* note 31, at 87-102; 1998 Congressional Presentation, *supra* note 6; *Parliamentary Assistance in Nepal*, *supra* note 17; CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE, *supra* note 15, at 107-12.

<sup>203</sup> See Kovacic, *Competition Policy Entrepreneur*, *supra* note 2, at 470-73; Langenfeld & Blitzer, *supra* note 165, at 348-49; McDermott, *Competition Counseling to Eastern Europe*, *supra* note 42, at 6 (discussing USAID-funded, six-month postings of one-lawyer-one-economist teams from the Department of Justice and the FTC); Waller, *Comparative Competition Law*, *supra* note 184; *USAID Website*, *supra* note 198 (discussing postings including Latin America, the Caribbean, and CEE lasting from one week to one year).

Some of the most sustained formats for transmitting U.S. ideals and ideas about law to China and the ex-Soviet regions have existed outside of formal programs to provide legal assistance or to promote emulation of U.S. models. Students and faculty from China, NIS and CEE states have absorbed U.S.-style legal thinking through year-long to three-year long immersion in U.S. law schools as LL.M. or J.D. candidates or visiting scholars. This channel (and the reverse flow of U.S. law faculty and students abroad) is long-established and has grown steadily in the Chinese case, and has, in recent years, become increasingly available to CEE and NIS nationals.<sup>204</sup> Perhaps equally important, many U.S. lawyers in private practice have been posted for multi-year tours in U.S. firms' offices in Beijing, Shanghai, Budapest, Prague, Moscow, Warsaw and elsewhere, where they have interacted regularly and repeatedly with locally hired lawyers and consultants in their offices as well as with other local lawyers, regulators and clients.<sup>205</sup> This channel also (and the more modest reverse flow of foreign lawyers to work in U.S. law firms) has a longer history in the P.R.C., but has been on a sharp upward trajectory in the NIS and CEE states and in reforming and developing nations on China's borders.<sup>206</sup>

### 2.3.2. "Types" of Advice

U.S. legal assistance programs and other media for exporting U.S. legal ideas have offered widely varying "types" of advice or

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<sup>204</sup> See Edwards, *supra* note 73, at 305 (discussing University of Indiana's relationship with East China Institute of Policy & Law and Duquesne University's relationship with CUPSL).

<sup>205</sup> See, e.g., Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 772 (1991) (describing the U.S. law firms' presence in several major Chinese cities).

<sup>206</sup> See *id.* at 784-87 (noting P.R.C. emphasis on having P.R.C. lawyers learn international economic law in order to protect Chinese interests while stating that involvement of foreign lawyers in P.R.C. transactions has now become routinely accepted); American Bar Association, *International Legal Placement Program* (visited Mar. 3, 1999) <<http://www.abanet.org/intlaw/ilx/placement.html>> (explaining the International Legal Exchange Program, which allows U.S. lawyers to work at foreign firms and foreign lawyers to work at U.S. firms). For a treatment of a similar trend of U.S. firms involved in China in the investment banking sector, see Ann P. Vandevelde, *Realizing the Re-emergence of the Chinese Stock Market: Fact or Fiction?*, 30 VAND. J. TRANSNAT'L L. 579, 596 (1997) (discussing Morgan Stanley's entrance into a joint venture with a Chinese bank, thus becoming the first U.S. investment bank allowed to participate in China's domestic capital market).

"prescriptions" to the P.R.C., the former USSR, and neighboring states. At one end of the spectrum, U.S. aid providers have made available detailed, full-text prescriptions that have followed U.S. models and have taken little account of local circumstances, attitudes and preferences. The tale of the instant, one-size-fits-all constitution for the new, unnamed CEE republic is but one of many similar derisively told anecdotes about American lawyers and law professors who have claimed to have "written" the constitution of a former Soviet Bloc nation, and to have done so with, at best, minimal familiarity with the country and after, at most, a few short visits.<sup>207</sup> Even when they have not boldly claimed to have been "founding fathers" and "constitutional framers," U.S. advisors sometimes have urged strikingly American-style arrangements on constitution-drafters in ex-Soviet states, particularly on such issues as the separation of powers, courts' powers of constitutional review, and provisions addressing individual liberties.<sup>208</sup>

The pattern of urging (or at least appearing to urge) highly detailed U.S. models has extended to the sub-constitutional level as well. The American securities law experts' unintended mitigation of the Mongolians' paper shortage illustrates one version of this phenomenon. Antitrust law has provided a less amusing but more significant example. Taking a position that has triggered significant disagreement among their peers, some U.S. advice-providers and commentators have argued that it is important to push NIS and CEE countries to adopt U.S.-style competition law, sometimes asserting that nothing else would suffice to secure competition law's indispensable contribution to the establishment and protection of market-oriented, law-governed economies. As some adherents to this view have bluntly put it, solving CEE states' problems of creating or restoring competitive markets required exporting the Sherman Act.<sup>209</sup>

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<sup>207</sup> See, e.g., Symposium, *supra* note 1, at 133 (containing Judge Wald's comment that "I think one out of every two lawyers I've talked to in the Washington metropolitan area helped draft the Czechoslovakian Constitution.").

<sup>208</sup> See Ludwikowski, *supra* note 138, at 167-91 (discussing examples of constitution drafting in several former Soviet republics); Perry, *supra* note 200, at 780-88 (providing descriptions by U.S. advisors of their roles in shaping CEE/NIS constitutions).

<sup>209</sup> See Waller, *Comparative Competition Law*, *supra* note 184, at 569-71; cf. Langenfeld & Blitzer, *supra* note 165.



U.S. advisors' presentations of detailed and unadapted U.S. models have not always, or necessarily, indicated an intent to provide the legal equivalent of a "turn-key plant" or an "off-the-shelf" set of laws. Proponents of U.S.-style solutions have sometimes made thoughtful arguments about why significant elements of U.S. models have been appropriate to the needs and circumstances of the CEE/NIS countries, the P.R.C., or other recipients in its region. For example, advocates of U.S.-style antitrust law have argued that U.S. law's focus on enhancing consumer welfare through promoting competition and its emphasis on hard economic analysis of anti-competitive effects offer advantages over European-style competition law's emphasis on protecting firms from unfair competition and its subjective standard of abuse of monopoly power. On this view, the argument for U.S.-style law has been that it would be less likely to result in a regime that, in practice, would impede market reforms by according excessive protection to the incompletely privatized, politically well-connected or only partially reformed state enterprises that have continued to be major, market-threatening actors in many ex-socialist economies. More generally, some prominent advocates of exporting the U.S. model of antitrust have argued that former Soviet Bloc states' adoption of EU-style competition law risked replicating the European error of doing "too much to protect individual competitors rather than the competitive process."<sup>210</sup> In the same general spirit, some of those who have urged U.S.-style bankruptcy law for the P.R.C. and former Soviet Bloc countries have argued that something approaching the American model is necessary to make creditors' rights clear and secure, to impose market discipline on enterprises and, thereby, to establish essential conditions for a well-functioning market and for attracting foreign investors.

Similar types of arguments have characterized constitutional advice and prescriptions, particularly with respect to separation of powers questions. On one hand, proponents of U.S. models and purveyors of American-style advice have maintained that CEE/NIS states and nascent Asian democracies along China's periphery need broad, U.S. Congress-like parliaments because a strong and well-staffed legislature is necessary to check the dis-

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<sup>210</sup> Waller, *Comparative Competition Law*, *supra* note 184, at 570; cf. Langenfeld & Blitzer, *supra* note 165.

proportionate power that the executive otherwise might wield in such systems. On the other hand, U.S. advisors and advocates for U.S.-style solutions for ex-Soviet Bloc countries also have argued that a presidential system, at least partly inspired by the American model, would be more suitable than a European-style parliamentary structure. On this view, a strong, centralized executive would improve the chances of avoiding chaos and paralysis in countries where a relatively large number of parties, some of them opposed to democratic and market reforms or a liberal rule of law, are likely to control relatively small blocks of seats in the legislature.<sup>211</sup>

In many cases, however, advisors who have provided highly detailed information on U.S. laws have not sought or expected to encourage emulation. Often, they have offered such elaborate materials merely for reference, illustration, or inspiration—as indeed may have been the case with the securities law experts' delegation to Mongolia. In one striking and rather extreme example, the U.S. consultants working on a UNDP project have provided Chinese law-drafters with extensive primary materials in several fields of U.S. law. But one of that program's central messages, carefully and extensively articulated by its American leaders and regularly and forcefully repeated to Chinese participants, stressed that copying U.S. laws or borrowing extensively from U.S. models simply could not have provided a viable solution for China's law-making needs.<sup>212</sup>

Many recent U.S. legal assistance projects have been "reactive" and offered less elaborate, model-like legal advice. Common methods for issuing this type of advice have included U.S. experts, providing fairly extensive commentaries on draft laws or preparing general primers or seminars on fields of U.S. law in response to requests from governments in the CEE/NIS or P.R.C. regions. Though often presented as legal analyses or overviews without a particularly American content, such advice still generally has reflected—sometimes quite explicitly and self-consciously—its providers' expertise, which has been overwhelm-

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<sup>211</sup> See Ludwikowski, *supra* note 138, at 170, 181-82, 251-55 (concerning the appeals of presidentialism to some post-Soviet constitution drafters); Stein, *supra* note 140, at 438-52 (regarding comments of a U.S. advisor to CEE constitution drafters).

<sup>212</sup> See Seidman & Seidman, *Drafting*, *supra* note 71, at 34-36; see also Seidman & Seidman, *The UNDP/BLA Project*, *supra* note 103.

ingly in U.S. law. Much of CEELI's work has been in these modes. Its formal "comments" and "analyses" have addressed draft legislation in such varied fields as antitrust, bankruptcy, business enterprises, constitutional amendments, criminal law and procedure, foreign investment, intellectual property, the judiciary, lobbying, privatization, secured transactions, and securities regulation—for countries ranging from Albania to Uzbekistan.<sup>213</sup> CEELI's "concept papers" (which CEELI describes as "discuss[ing] major issues that a law on a particular topic must address, provid[ing] guidance and foster[ing] discussion among drafters") have focused on topics including money-laundering, consumer protection, antitrust, securities regulation, and foreign exchange controls—for Bulgaria alone. Additional examples of CEELI concept papers include those that have addressed criminal punishment for Moldova, criminal law and procedure for the Czech Republic, trade regulation for Poland and election law for Ukraine.<sup>214</sup> The American-led UNDP program for economic legislation-drafting in the P.R.C. also defined its consultants' principal roles to include providing counsel on draft legislation prepared by the Chinese participants to address topics that ranged from government budgets to environmental protection.<sup>215</sup>

Other organizations have pursued a similar course of providing fairly general advice and information about U.S. law and offering assistance primarily in response to requests and proposals from recipient countries. Some foundation-backed projects, including those sponsored by the Soros organizations' COLPI and Open Society Foundations in the CEE/NIS regions and by the

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<sup>213</sup> See Central and Eastern European Law Initiative, American Bar Association, *Legal Assessments and Concept Papers* (visited Mar. 29, 1999) <<http://www.abanet.org/ceeli/assessments.html>>; Central and Eastern European Law Initiative, American Bar Association, *CEELI Legislative Assessments and Concept Papers* (visited Mar. 30, 1999) <[www.abanet.org/ceeli/pricelst.html](http://www.abanet.org/ceeli/pricelst.html)>.

<sup>214</sup> See, e.g., Eleanor M. Fox, *American Bar Association Selection of Antitrust Law Comments on Draft Bulgarian Antitrust Law*, 60 ANTITRUST L.J. 245 (1991-92) [hereinafter Fox, *Selection of Antitrust*]; CEELI, Concept Paper, *Consumer Protection Laws in Bulgaria*, 5 PACE INT'L L. REV. 25 (1993); CEELI, *Money Laundering: A Concept Paper Prepared for the Government of Bulgaria*, 28 INT'L L.J. 835 (1994); CEELI, *Currency Exchange Controls: A Concept Paper for the Bulgarian Government*, 29 INT'L L.J. 257 (1995); CEELI Website, *supra* note 21.

<sup>215</sup> See generally Seidman & Seidman, *The UNDP/BLA Project*, *supra* note 101.

Ford Foundation in China and elsewhere, have prepared and distributed translations of English-language legal text books or have commissioned new works (including writings by American authors) that have sought to introduce "basic concepts" or general fields of law (as they are understood in the United States or the West more generally).<sup>216</sup> In the public sector, specific U.S. legal assistance programs often have been "reactive" in the sense that the first step in the process has occurred when a recipient-country official or organization has approached the local U.S. embassy to request law-related aid. Also, a significant portion of the advice on competition law, capital markets, trade-related laws, and other issues that official U.S. sources have provided to CEE/NIS and P.R.C. recipients has been cast in fairly general terms. While the frame of reference for such general advice often has clearly been American law, such assistance projects, at least sometimes, have eschewed specific and detailed prescriptions for legal reform in recipient countries.

Some U.S. programs and providers consciously have sought to provide types of substantive advice that have not been distinctly "American" in content. They have focused their assistance on issues with respect to which it has appeared possible to articulate legal principles that have won common international acceptance or that plausibly can be claimed to have general or universal validity.<sup>217</sup> CEELI and other non-profit U.S. providers have often stressed areas where U.S. laws and practices closely track UN or other international standards (for example, on questions of judicial independence), or simply have provided advice that has included at least as much Western European law as American law

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<sup>216</sup> See *Soros Foundations Network National Foundations* (visited Mar. 1, 1999) <<http://www.soros.org/natfound.html>> (including sites for COLPI and Open Society Foundations); *Ford Foundation* (visited Mar. 1, 1999) <<http://www.fordfound.org>>.

<sup>217</sup> One example is the CLDP, which has conducted seminars that typically focus on areas in which international standards tend to predominate (such as project finance or foreign investment law). Similarly, U.S. advice and demands concerning reforms to China's copyright regime typically have emphasized conformity to the Berne Convention standards and not to the sometimes idiosyncratic content of U.S. law. Moreover, some U.S. government programmatic commitment to, or at least, tolerance for, "generalist" approaches is suggested by the generic rhetoric of the "rule of law" agenda and by the extensive support USAID has given to CEELI, which often has advocated advice that does not narrowly follow U.S. models.

(for example, on issues of competition law).<sup>218</sup> COLPI's "basic concepts" series, and other text projects, and the Ford Foundation-sponsored series of lectures on "raising rights consciousness" in the former Soviet world have emphasized general rule of law values, adaptable to a variety of local circumstances, rather than detailed accounts of U.S. models.<sup>219</sup> The same approach of stressing general or universal norms and playing down elements of "Americanness" also has characterized U.S. efforts to provide legal advice in the P.R.C. and countries in its region. Examples include international seminars and conferences on law and economic development and legal reform that have been supported by the Ford Foundation, CLEEC, and the Asia Foundation, a series of summer law institutes on selected legal topics that has brought U.S. legal academics and jurists to Beijing, and courses on contracts and human rights that the Asia Foundation has organized in Southeast Asia.<sup>220</sup>

This trend of steering clear of U.S. models in favor of advice cast in terms of general or common principles, has been less evident in U.S. government aid programs. Still, it has occurred, for example, in competition policy advice (which has to a degree accepted European models), commercial law advice (which has sometimes stressed broadly international standards), and general "rule of law" assistance (which has sometimes emphasized fairly generic ideas and ideals).

Other U.S. and U.S.-backed advice efforts have offered another type of guidance that also has not been obviously U.S. model-exporting. These efforts have focused on assistance in at

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<sup>218</sup> See Symposium, *supra* note 1, at 118-21, 140; see also Byrne & Schrag, *supra* note 52, at 452 (stating that the European model was used by the Georgetown Project on Legal Assistance in advising the Estonian government on law reform); Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201, 1207 (1995) (discussing how in requesting evaluation of draft legislation, Central and Eastern European parliamentarians and legislative assistants often ask CEELI to compare it to Western European legislation); *Judicial Reform*, *supra* note 149 (regarding UN principle of independent judiciary).

<sup>219</sup> See COLPI Website, *supra* note 30; The Ford Foundation, *supra* note 57.

<sup>220</sup> See Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19, 19-22 (Pitman B. Potter ed., 1994); Asia Foundation, *Programs in Asia: China*, *supra* note 100; Asia Foundation, *Programs in Asia: Cambodia* (visited Mar. 2, 1999) <<http://www.asiafoundation.org/taf/programs/prog-asia-camb.html>>; *Ford Foundation Regional Overviews*, *supra* note 27.

least ostensibly “neutral,” “scientific,” or context-appropriate techniques for making, implementing and applying law. On the parliamentary side, examples have included training in legislative drafting, procedures and research as well as instruction in the operation of committee systems that USAID has provided in Poland and Nepal and that the Ford Foundation and a largely U.S.-staffed UN program have provided in China.<sup>221</sup> On the administrative or executive side, U.S. government aid efforts have included programs to train CEE agency staffs and leaders in the “how’s” and “why’s” of antitrust investigation and enforcement, securities market oversight, and the education of P.R.C. officials in methods of intellectual property protection and regulation.<sup>222</sup> For judiciaries, U.S. and U.S.-based projects have included USAID-backed efforts to promote the enforceability of judgments, the bench’s familiarity with new legislation, and judges’ ability to conduct alternative dispute resolution in Russia. They have also included CEELI, Ford Foundation, and foundation-supported programs to improve the training and professional capacity of judges in China, some of its reforming neighbors, and throughout the former Soviet areas.<sup>223</sup> More broadly, a myriad of public and private U.S. programs have sought to raise the general competence of lawyers, lawmakers, regulators, and jurists by im-

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<sup>221</sup> See Seidman & Seidman, *Drafting*, *supra* note 71; USAID, *supra* note 7 (referring to legislative strengthening in Poland and parliamentary assistance in Nepal); *Ford Foundation 1995 Annual Report*, *supra* note 25.

<sup>222</sup> See Mastalir, *supra* note 165; Kathleen E. McDermott, *Targeting Professions for Antitrust Prosecution—Perception or Reality?*, 5 WTR-ANTITRUST 30 (1990); Doty, *SEC Perspective*, *supra* note 43, at 123; Celia R. Taylor, *Capital Market Development in Emerging Markets: Time to Teach an Old Dog New Tricks*, 45 AM. J. COMP. L. 71, 103 (1997) (regarding USAID-UK help in structuring IPO in Russia); *Memorandum of Understanding*, *supra* note 124 (discussing the training that the U.S. Patent Office is to provide under the MOU involving the U.S. Patent Office and its P.R.C. counterpart).

<sup>223</sup> See 1998 *Congressional Presentation*, *supra* note 6 (regarding USAID and Russia); *Judicial Reform*, *supra* note 149 (stating that the Georgetown project for Estonia moved quickly from very general legislative drafting to training lawyers, judges, and legal professionals for sophisticated specialties as the legislative needs changed); Byrne & Schrag, *supra* note 52, at 449; *Asian-American Exchange*, *supra* note 193 (noting the 1995 “neutral” conference in Beijing regarding the legal and judicial requisites of economic reform, trade, and investment).

proving the quality of legal education and training in China, some nearby nations, CEE countries and the NIS.<sup>224</sup>

Some of the least concretely detailed, distinctively American, and highly prescriptive types of U.S. legal advice and modes of U.S. legal export have been characteristic of many U.S. programs that have sought primarily to provide access to legal materials and ideas or methods of legal education (albeit, in practice, often U.S. ones). Several examples suggest the range of such programs. CEELI's sister law school program has linked dozens of U.S. institutions with well over a hundred CEE/NIS counterparts, and has included a substantial library program as well as curriculum and planning assistance. The Ford Foundation and USAID projects have supported broadly similar work to improve libraries and legal education in China and Russia. CEELI's Commercial Law Program has established a commercial law library and resource centers in a few former Soviet Bloc states. A U.S. law school-based project has worked to establish a research program linking academics, government officials, and jurists from the United States and China. ABA's ILEX program has placed U.S. lawyers abroad (and foreign lawyers in the United States), in part of an effort to facilitate transmission of ideas and information about law and lawyering.<sup>225</sup>

Also at the less aggressively or conspicuously "model-exporting" end of the U.S. legal assistance spectrum, several programs have supported locally run or locally staffed projects in recipient countries. Much of the support that the Ford Foundation, the Soros-backed Open Society organs and COLPI, CEELI, USAID and others have provided to legal education in China and the CEE/NIS region, has been sufficiently unrestricted or collaborative to fit this pattern. Specific efforts have included Ford Foundation grants to support Chinese universities' research and conferences on criminal justice reform, development of new law teaching methods and materials, and compilation of opinions is-

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<sup>224</sup> See, e.g., Whitmore Gray, *The Challenge of Asian Law*, 19 FORDHAM INT'L L.J. 1 (1995) (concerning CLEEC programs and Ford funding for CLEEC); Edwards, *supra* note 73 (same); 1998 Congressional Presentation, *supra* note 6 (describing programs to support legal education and training of the Russian judiciary).

<sup>225</sup> See Lawrence, *supra* note 16, at 675; Harold C. Wegner, *Introduction to Symposium: Intellectual Property*, 16 HOUS. J. INT'L L. 1 (1994); 1998 Congressional Presentation, *supra* note 6; CEELI Website, *supra* note 21; ABA Website of International Law, *supra* note 22.

sued by Chinese courts. Efforts have also included funding government training programs for basic-level state personnel.<sup>226</sup> Soros-funded projects have pursued similar ends through similarly responsive and collaborative channels, with much decision-making delegated to local participants in several countries in the CEE/NIS region.<sup>227</sup> Equally broad openings for local or regional involvement and for non-American content appear to have characterized projects funded by the Asia Foundation and USAID to arrange trips for legislators from Nepal and other nations on China's periphery to interact with their counterparts elsewhere in the region.<sup>228</sup> The same can be said about the partly Ford Foundation-supported CEE Parliamentary Practices Project, which has afforded similar networking opportunities for reformist legislators from around the relevant region, and Soros-backed short courses or degree programs for CEE/NIS scholars and students, which have allowed participants to study nearby foreign nations' experiences and to forge connections with one another.<sup>229</sup>

There also have been signs of movement toward this general type of advice and assistance over time. Indications of this pattern include the move to using local lecturers in the Ford-supported program on "raising rights consciousness" in CEE, USAID's policy of "weaning" relatively long-term CEE recipients from U.S. and other foreign experts in favor of locally developed expertise, and USAID's shift (and private foundations' similar moves from a more established base) toward greater support for programs that collaborate with host-country NGOs.<sup>230</sup>

Outside of formal assistance programs and beyond the activities of those who have seen themselves as broadly pro bono promoters of legal reform in the P.R.C., the former Soviet Union, and adjacent states, other mechanisms for disseminating or promoting U.S. legal models or U.S.-supported legal change in those countries have been quite varied in the specificity and the

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<sup>226</sup> See The Ford Foundation, *Annual Reports, 1994-97* (visited Mar. 17, 1999) <<http://fordfound.org/about/ar.html>>.

<sup>227</sup> See Carothers, *Aiding Post-Communist Societies*, *supra* note 31.

<sup>228</sup> See USAID, *supra* note 7 (referring to parliamentary assistance in Nepal); *Programs in Asia: China*, *supra* note 100; *Programs in Asia: Vietnam*, *supra* note 102.

<sup>229</sup> See *Ford Foundation 1995 Annual Report*, *supra* note 25; QUIGLEY, *supra* note 31, at 74, 78.

<sup>230</sup> See *id.*; 1998 *Congressional Presentation*, *supra* note 6; see also CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 15.



"Americanness" of what they have transmitted or sought to instill. Thus, the U.S. government demands for reforms in Chinese or CEE/NIS laws and law-related practices have ranged from, on one hand, calls for a loose, general conformity to international standards for human rights, intellectual property protection or level playing fields in trade and investment relations to, on the other hand, the kinds of highly specific undertakings for revising national laws and enforcement practices that have been embodied in some bilateral MOUs on securities and intellectual property or in the legal requirements imposed on Chinese or CEE/NIS issuers seeking listings on U.S. equities exchanges.

Depending on their own views, the nature of the transaction, the concerns of the client, and, no doubt, a host of other, sometimes idiosyncratic factors, U.S. lawyers representing American investors, joint-venturers or traders in dealings with P.R.C. and CEE/NIS regulators and companies sometimes have pressed for arrangements that conform to U.S. legal norms and standards (while, on occasion, seeking to educate their counterparts on the importance of accepting or adopting those terms more generally). At other times, they have been far more accommodating of local differences and preferences. Finally, U.S. legal education for lawyers from the former Soviet world, China, and environs has exposed these foreign students to courses with widely varying content. At one end of this wide spectrum, highly specialized and doctrinal courses, particularly in business law fields, may have provided (or at least seem to have been perceived by some students as providing) a set of highly detailed prescriptions for improving their own countries' analogous laws. At the other end of the spectrum, the legal theory and comparative law courses that have attracted a smaller, but growing, share of graduate law students from the P.R.C. and CEE/NIS region appear to have conveyed a much more general, flexible, and, at times, highly skeptical message about U.S. legal ideas, ideals, and their possible implications and relevance for students from former and reforming socialist states in Europe and Asia.

### 3. EVALUATING U.S. LEGAL ADVICE PROGRAMS AND THE EXPORT OF U.S. LEGAL MODELS

Recent U.S. efforts to provide legal assistance abroad, and other channels for spreading U.S. legal ideas internationally, have produced relatively few and rather modest instances of implemen-

tation of U.S. prescriptions or effective exports of U.S. legal models, although such outcomes neither definitively establish a current or permanent lack of significant influence and impact, nor reliably confirm that apparent successes to date will prove real and lasting. Experiences from China and its neighbors, Central and Eastern Europe, and the states of the former Soviet Union provide illustrations, and some of the most important instances, of these patterns and problems. They also suggest several conclusions about what factors are conducive to success—and failure—in the pursuit of an agenda that includes promoting market economies, electoral democracy or the rule of law. Some of these lessons concern issues of process or format for extending assistance or exporting models. Others address questions of the subject matter of the advice or ideas and the economic or political contexts in which the prescriptions or models are offered and received. While these lessons are not fundamentally inconsistent (and in some instances overlap) with one another, the “substantive” lessons are perhaps best understood as caveats or supplements to the lessons about “process.”

3.1. *“Process” Lessons: Responsive and Collaborative Programs, Durable Commitments, Local Knowledge, and “General” or “Neutral” Prescriptions*

U.S. programs to provide legal assistance and efforts to propagate U.S. legal models seem to fare better when they respond to what relevant groups in recipient countries see as their needs, and when they work reasonably closely with key institutions and elites in recipient countries.

A failure to follow this precept is among the many shortcomings that arguably doomed the efforts of the American academic who printed out and sent off—through an intermediary—a proposed constitution for a post-Soviet republic whose citizens and circumstances appear to have been unknown, and of no special concern, to the drafter. The same can be said of our other opening parable—that of the U.S. securities law experts whose notion of providing assistance was to leaflet their briefly encountered Mongolian beneficiary with xeroxes of U.S. laws assembled before the delegation left the United States. In the same vein, U.S.-based or U.S.-backed efforts to provide China with advice on constitutional reform have been ineffective and almost non-existent because there has been no official P.R.C. support for, or

tolerance of, such undertakings. Similarly, a publicly funded U.S. program to improve judicial competence and autonomy in Romania foundered, on one credible account, because the program lacked a skilled, supported partner on the host-country side.<sup>231</sup>

Perhaps responding to or anticipating such patterns of failure, some of the largest and most well-established non-government programs clearly have taken some version of the lesson as part of their official philosophies. The relative success that some of these programs or some of their individual projects appear to have enjoyed seems partly attributable to their having at least occasionally implemented these creeds. One example is the Ford Foundation's China program, which has followed a policy of maintaining a resident officer in China for its law programs, to serve as an involved coordinator of Foundation-funded projects and as a liaison with local legal educators, researchers, and officials who have often played a leading role in developing (as well as implementing) project ideas. The approach has given Ford's efforts a particularly high profile in China (especially among lawyers, legal educators and sympathetic officials) and has won generally favorable reviews from participants and observers. When Ford moved to establish a legal assistance program in Vietnam, it sought to replicate what it believed to be the successful China model, beginning with an investigation of Vietnam's legal and legal-educational needs, along with an inventory of government and academic institutions and various groups that might serve as local collaborators.<sup>232</sup> For another example, the largely American-staffed UNDP project, aimed at raising the quality of legislation-drafting and of several key pieces of legislation in the P.R.C., stressed the importance of team-efforts among foreign consultants and Chinese law-drafters and Chinese law drafting trainers. And the internal and external reviews of that UN program attributed its success in significant part to this collaborative strategy.<sup>233</sup>

Among programs targeting the CEE/NIS region, CEELI has declared that responding to locally articulated requests is one of

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<sup>231</sup> See CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE, *supra* note 15.

<sup>232</sup> See Sidel, *supra* note 132, at 222. Indeed, one of the principal participants in the early stages of the Vietnam project was a former legal program officer in the Beijing office.

<sup>233</sup> See Seidman & Seidman, *Drafting*, *supra* note 71; see also Seidman & Seidman, *The UNDP/BLA Project*, *supra* note 101.

its three core principles.<sup>234</sup> CEELI has also defined its in-country liaisons' primary roles to include working closely with local lawmakers and law reformers and acting as clearinghouses or go-betweens for locals' requests to CEELI for advice. In recent years, CEELI's sister law school program has shifted its focus toward clinical and professional skills components in response to CEE participants' expressed interests. Background papers and commentaries on proposed legislation, which comprise a large share of CEELI-supported work, have been prepared in response to recipient countries' requests, and are supposed to be tailored to local needs and concerns. Critics have complained, often justifiably, that too often such CEELI advice has not taken local needs and circumstances adequately into account. Nonetheless, various observers have found particular CEELI's ventures (including, for example, its workshops on constitution-drafting) to be relatively effective and influential. And they have attributed such efforts' success to CEELI's close coordination with recipient nations' leaders and lawyers (including, for example, members and staff of constitutional drafting committees).<sup>235</sup>

Imperatives of collaboration with local participants and responsiveness to local needs and requests also have characterized some of COLPI's principal mandates. Examples include its role as coordinator of law-related programs run primarily through the largely locally staffed Open Society Foundations and Open Society Institutes in NIS and CEE countries, and its role as operator of programs to adapt manuscripts on basic legal concepts to suit the needs, interests and circumstances of individual countries. Like the Ford Foundation's China projects, the Soros network's CEE/NIS programs have been among the most highly regarded in their region. Favorable reviews often have linked their success to their patterns of extensive involvement with host-country lawyers and academics and intensive cooperation with indigenous educational and non-governmental organizations.<sup>236</sup>

Legal advice and assistance programs operated and supported by the U.S. government have sometimes endorsed and imple-

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<sup>234</sup> The other two central elements are an approach that abjures a narrow focus on American models and an insistence on providers' commitment to public service and avoidance of conflicts of interest.

<sup>235</sup> See Ludwikowski, *supra* note 138, at 159.

<sup>236</sup> For examples of such accounts, see generally Carothers, *Aiding Post-Communist Societies*, *supra* note 31 and QUIGLEY, *supra* note 31.

mented similarly responsive and cooperative approaches. Thus, the process that has typically led to help from USIA's law programs has begun with a foreign government's approaching the local U.S. embassy with a request for support or advice in improving its judicial system, preparing revisions to its constitution, or providing information about U.S. law, legal education, or access to U.S. jurists. In addition, USAID's standards for approving legal assistance proposals have incorporated criteria that assume reliance on a degree of effective cooperation with recipient country governments. One key official USAID criterion, for example, is that the recipient state have established (or have solid prospects for creating) adequate domestic support for the rule of law.<sup>237</sup> USAID-funded programs and American-staffed UN projects to strengthen parliaments or legislative processes in the former Soviet regions, China, and along China's periphery have all preached, and sometimes seemed to have practiced, strategies of fairly close coordination with aid-receiving institutions and extensive adaptation to national political circumstances and institutional conditions. These features seem to have contributed significantly to the relatively high marks these programs have received from at least partly objective observers.<sup>238</sup>

Those U.S. programs and advisors who have acted in accordance with the lesson of reacting to locally articulated imperatives and cooperating with local elites and groups have had to grapple with questions of to whom they should respond and with whom they should cooperate in recipient nations. These are commonplace issues in legal transplants, but they have had peculiar and especially problematic features in the context of U.S. legal exports to China, the former Soviet Union, and neighboring states. Although U.S. programs and purveyors of U.S. legal models often seem to have adopted a practice of dealing fairly indiscriminately with office-holders and staffs of government or educational institutions who have sought advice or assistance, even such relatively "neutral" approaches inevitably have involved U.S. programs and providers in recipient countries' internecine institutional or partisan rivalries. The government-to-government approach of significant official U.S. assistance and some private assistance (including a good deal of CEELI's work, for example) has sometimes created

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<sup>237</sup> See Bankson, *supra* note 5.

<sup>238</sup> See USAID, *supra* note 7; Seidman & Seidman, *Drafting*, *supra* note 71.

an impression of "taking sides" against local critics of the government. This issue appears to have been especially serious and controversial in some former Soviet Bloc states where political instability has been relatively high and where critics of the government often have seen themselves as the true allies of reform, democracy and the "rule of law."

The concern appears to have been increasing recently with respect to U.S. programs in the P.R.C. as well. Top-level bilateral accords have led to new State Department-led "rule of law" initiatives that critics in the U.S. and in China have seen as favoring a coordinating and mediating role for central P.R.C. government authorities, and some view the initiatives as posing a threat to the promising dispersed efforts to promote law reform and legal development that had begun to emerge with some help from decentralized U.S. programs and channels for providing advice on U.S. legal ideas.

In some cases, involvement in recipient nation's intranational divisions seems to have been part of a more striking and, arguably, a more conscious policy of selective collaboration to enhance the impact and efficacy of assistance efforts. This has been relatively obvious in the case of U.S. programs (such as those supported by Ford and Soros, as well as some government-funded ones) that seem to have sought out and cultivated alliances with Chinese or post-Soviet reform-minded lawyers or legal academics who have had connections to their countries' policy-makers (particularly in the Chinese case) or to emerging political pressure groups and other autonomous organizations (especially in the CEE states).

Somewhat less conspicuously, a similar pattern appears to have characterized programs that have sought to improve the capacity of legislatures, which (if effective) have obvious potential to affect the balance between reasonably democratic or pro-"rule of law" parliaments and more authoritarian-leaning executive branches and bureaucracies in much of the former Soviet world and, to a degree, in China and other reforming states in East and Southeast Asia. Certainly, U.S. government-funded, democracy-promotion assistance sometimes has been openly partisan, supporting indigenous political parties that U.S. officials or their agents and grantees have seen as more favorably disposed toward democratic values and the rule of law, particularly in parts of the former Soviet Bloc. It would be remarkable if a more subtle ver-

sion of that attitude has not characterized some, more narrowly law-focused programs.

On more specific and concrete issues of legal reform as well, some U.S. participants and commentators have suggested that efforts to provide U.S. legal advice or to export U.S. legal ideas generally enhance their prospects for success when they treat divisions within recipient countries as strategic considerations. On this view, a key to effectiveness for efforts to promote a particular agenda of legal change has lain in seeking out host-country institutional and organizational constituencies that, first, have had inclinations or interests (either *ex ante* or because of incentives structured by U.S. actors) favoring their countries' implementation of U.S. advice or emulation of U.S. models, and that, second, appear to have had the ability to press effectively for following such prescriptions. In this vein, U.S. participants in efforts to promote U.S.-style or U.S.-acceptable, uniform or harmonized transnational commercial or financing laws have argued that it has been important to make sure that the lawyers and lawyer-bureaucrats who would have to implement the proposed rules, and the ministry officials or representatives of political leaders who would have to secure the acceptance of the proposed rules have been involved in the multilateral process, have publicly committed themselves to support those rules, and have been made to understand the economic costs of not conforming to the proposed rules.

U.S. government actions—often outside of assistance programs—suggest a similar perspective at work. For example, the bilateral MOUs on intellectual property, securities, trade, and other law reforms in China often have been structured primarily as almost contract-like agreements between the relevant specialized regulatory and administrative organs, and typically have been backed by the threat of U.S. government-imposed economic sanctions in the event that the P.R.C. side failed to perform the stated undertakings. Such experiences do suggest some support for the view that identifying potentially influential groups of bureaucrats, lawyers, or policy-makers, and then tailoring the package of proposed legal changes and bundling those proposed changes with the proper array of carrots and sticks, sometimes has been a key to improving the prospects for securing the im-

plementation U.S. or U.S.-favored legal rules, ideas, and practices in targeted countries.<sup>239</sup>

The development of a host of relatively informal channels for transmitting U.S. legal models and information about U.S. law to China and the post-Soviet world also appears to confirm the advantages of collaboration with recipient-country actors and responsiveness to their concerns. Anecdotally, at least, it seems that the flow of legal knowledge and norms from U.S. lawyers to CEE, NIS, and P.R.C. counterparts, or from American law professors and legal experts to students and others from China and the former Soviet Bloc, seems to have been most extensive and effective when the U.S. participants have conveyed a sense of collegiality or equality with their counterparts, and when they have listened to, and, to a degree, responded to, recipient-country lawyers' concerns, questions, or insistence on a degree of accommodation to local laws and practices.

Sometimes the roots of informal cooperation and collaboration have run deep, and have created a foundation of trust that has supported qualitatively greater influence of transmitted ideas. For example, as one close observer has seen it, U.S. constitutional ideas and ideals had a relatively significant impact in the Czech Republic because its leaders were former dissidents who had worked cooperatively with U.S. lawyers and academics through Helsinki Watch and, therefore, welcomed Americans as advisors in the post-Velvet Revolution constitution-making.<sup>240</sup> Less dramatically, some of the U.S. lawyers and legal scholars who, early on, established themselves as "friends of China" (through their willingness to assist in the early, not strongly U.S.-emulating, post-Mao law reforms, and to explain and defend—albeit sometimes critically—the progress of law reform in China) seem to have remained among the more acceptable and influential sources

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<sup>239</sup> See Kathryn Hendley, *The Spillover Effects of Privatization on Russian Legal Culture*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 39 (1995); Rodriguez & Coate, *supra* note 163, at 333-37 (discussing the structure of demand and support for antitrust-law reform and development in reforming economies); Interview with Charles W. Mooney, Jr., Professor at University of Pennsylvania Law School, in Philadelphia, PA. (May 5, 1998) (regarding his experience in international commercial law reform, uniform law, and harmonization). The utility of such alliance-focused or collaborative approaches is commonplace in dealing with legal assistance for China. See, e.g., Seidman & Seidman, *The UNDP/BLA Project*, *supra* note 101.

<sup>240</sup> See Stein, *supra* note 140, at 423-25.



of U.S. and other foreign legal ideas in official and unofficial Chinese legal circles.<sup>241</sup>

Such relatively modest informal channels aside, U.S. legal assistance programs and proponents of the U.S. legal models for the P.R.C., the former U.S.S.R. and nearby states have not been able to rely very much on one commonplace mechanism of effectuating legal transplants. They have not been able to count on the active collaboration or general support of an autonomous and influential cadre of legal professionals in recipient countries.<sup>242</sup> China, like neighboring nations in East Asia, has not had a centuries-old tradition of laws and lawyering similar to that found in the West. The emerging legal profession took a severe pounding under communist rule, especially during China's Cultural Revolution decade. While the current era of economic and political reform has led to the rapid rehabilitation and expansion of the legal profession, the old guard of lawyers trained before the heyday of Maoism is tiny and relatively elderly. The rapidly expanding group of lawyers trained during the reform era has remained comparatively small, uneven in quality and rather weak in its sense of professional identity and autonomy. Moreover, party and state organs (which, however, increasingly include people with legal training) have remained firmly ensconced both as gatekeepers for most foreign legal advice and assistance programs, and as a source of constraint on the development of the domestic legal profession. The Chinese pattern has been broadly characteristic of other reforming countries in the region, including Vietnam.<sup>243</sup>

The history of the legal profession is a bit different in some of the NIS and CEE countries, but the effect on local lawyers' roles

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<sup>241</sup> Among the U.S. lawyers who pioneered in providing legal advice and services to U.S. investors in reform-era China were long-established leading scholars of Chinese law. They included Jerome Cohen (a professor at Harvard Law School and later a lawyer with Coudert Brothers, Paul Weiss Rifkind Wharton and Garrison, and a member of the NYU law faculty). Cohen also played a significant role in offering informal advice on reforming Chinese law.

<sup>242</sup> See Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996).

<sup>243</sup> See generally Shen Zongling, *The Role of Lawyers in Social Change: China*, 25 CASE W. RES. J. INT'L L. 163 (1993) (detailing recent developments in the legal profession in China); William P. Alford, *Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 CHINA Q. 22 (1995); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* (1998); Sidel, *supra* note 132 (regarding law reform in Vietnam).

as facilitators of legal transplants and loosely U.S.-style legal change has been broadly similar. In some parts of the former Soviet world, there is, of course, a much stronger, pre-communist precedent for a broadly Western-style role for lawyers. Still, communist rule in much of the NIS/CEE region has taken a serious, if complex, toll on the scale, stature, and autonomy of the bar and bench. The experiences of the Soviet or Soviet-dominated era in many ways reduced radically the role of lawyers, dissuaded many talented people from pursuing legal careers, and left the legal profession with a legacy of low status or a taint of collaboration with now-discredited regimes.<sup>244</sup>

If, as seems very plausible, the relative weakness of lawyers-as-collaborators and lawyers-as-recipients has been a factor in limiting the impact of U.S. legal assistance and the influence of U.S. legal models in the P.R.C. and CEE/NIS regions, then the pattern offers further support for the lesson that cooperating with appropriate local participants and responding to discernible and articulated local needs and desires are keys to success for U.S. legal advice efforts and for the export of U.S. legal ideas, institutions, and practices.

A second and, in practice, closely related "process lesson" is that U.S. programs to provide legal assistance and other efforts to export U.S. legal models are more likely to have an impact when they involve relatively sustained commitments by advice-providers and export-promoters. This lesson that durable commitments are important is a plausible piece of conventional wisdom. It also has been something of an article of faith among some major and, by most accounts, relatively successful U.S. aid programs. Among efforts targeting China, the Ford Foundation's structure of having a resident mission in Beijing, with a series of law program officers serving for a few years each, has reflected acceptance of this lesson. A similar view seems to have held sway among U.S. participants in a UN-sponsored project to build China's legislation-drafting capacity who thought it vital that

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<sup>244</sup> See Symposium, *supra* note 1, at 138-39 (regarding the collaboration of lawyers with regimes in Communist Eastern Europe); Kovacic, *Competition Policy Entrepreneur*, *supra* note 2, at 452 (indicating that the Soviet emphasis on technical fields and the stigma placed on legal training resulted in a limited selection of lawyers with experience in commercial law).

their program have a sustained and reiterative multi-year format.<sup>245</sup>

Among assistance efforts focusing on the CEE/NIS region, CEELI's resident liaisons, who have been posted for one or two years in a country in the region, have been— according to CEELI leaders and some outside observers— the linchpins of the organization's programs. CEELI also has favored the method of relatively long-term postings of "legal specialists" (who have been more experienced attorneys with expertise in a particular field). Both official CEELI sources and critics of CEELI's work have expressed skepticism about the efficacy of short-term seminars and other unsustained modes of advice that CEELI has sometimes orchestrated.<sup>246</sup>

Much the same perspective appears to have informed U.S. government programs for the CEE region that have dispatched government attorneys for several-month or year-long stints, or repeated shorter term visits, to provide advice in such fields as criminal law and procedure, and competition law and regulatory process. Patterns of reiterative, on-going legal advice from U.S. agencies' home offices to their P.R.C. and CEE/NIS counterparts indicate an additional dimension of official U.S. programs' appreciation of the importance of continuous and long-term (if remote) engagement. The same can be said of USAID's and USIA's practices of working with, and through, U.S. embassy-based staffers on relatively long-term assignments in recipient countries. Some sense at higher levels in the U.S. government that sustained and structured engagement is an important factor in effective programs of official U.S. legal assistance also seems to have been reflected in recent efforts to establish formal institutional structures within the Department of State. These structures have sought to coordinate implementation of a "rule of law" initiative for China (undertaken in the wake of P.R.C. President Jiang Zemin's U.S. visit) and to provide coordination and oversight of the many U.S. government programs that have sought to support law reform

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<sup>245</sup> See Seidman & Seidman, *Drafting*, *supra* note 71, at 34-36.

<sup>246</sup> See Symposium, *supra* note 1, at 118-21 (regarding liaison programs and stating that short-term workshops and seminars can work if they are part of a long-term, on-the-ground commitment); see also *id.* at 140 (praising the United States for long-term in-country placement of advisors and for bringing people to the United States for education rather than using the seminar model).

and legal development abroad, especially in the former Soviet world.<sup>247</sup>

Moreover, a vague but widespread sense that repeat-participants in the process of providing advice abroad have been relatively successful, and advisors' self-reports of the steep learning curve that they encountered on early missions, further support the idea that durable commitments make for more effective advice-mongering.<sup>248</sup>

Scattered evidence concerning informal channels for the transmission of U.S. legal ideas and the non-aid side of U.S. government efforts provide some further support for this lesson. The U.S. lawyers who seem to have had the most influence are those who have had long-standing relationships with recipient countries and their legal-political elites, whether as old "friends of China" from the earliest days of reform and before, or as foreign allies of former dissidents who became lawmakers and constitution-drafters in post-Soviet Central and Eastern Europe. Less dramatically but in the same vein, U.S. lawyers who have been resident in CEE/NIS or P.R.C. offices of American and other Western firms have been relatively effective conduits for the transmission of U.S. legal ideas, at least in comparison to their colleagues who have participated only in isolated transactions. Somewhat similarly, U.S. government efforts to secure U.S.-style or U.S.-favored domestic legal reforms in China or the former Soviet world appear to have been somewhat more effective when they have pursued such change through protracted, reiterative negotiations. Progress on legal problems concerning fair trade, openness to U.S. investment, or protection for U.S. intellectual property often seems to have occurred, if at all, after several rounds of threats, counter-threats, and MOUs hammered out among repeat players representing each side.

The adverse consequences of a lack of sustained engagement arguably were also on display in the tale of the ready-made post-

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<sup>247</sup> Examples of this coordination or centralization effort include the appointment of a senior State Department official, Ambassador Richard Morningstar, to coordinate the substantially CEE/NIS-related rule of law efforts in the State Department and beyond, as well as the creation of a post, initially occupied by Yale Law School Professor Paul Gewirtz, to oversee the implementation of new rule of law initiatives, including those targeting the P.R.C.

<sup>248</sup> See generally Barbara A. Perry, *Constitutional Johnny Appleseeds: American Consultants and the Drafting of Foreign Constitutions*, 55 ALB. L. REV. 767 (1992).

Soviet constitution that the U.S. law professor sent, effectively without return address, in response to a single inquiry through an intermediary, and the story of the thick stack of U.S. securities law materials that the lawyer-tourists distributed during their single brief visit to Mongolia. The same basic conclusion also draws general support from the many tales—endlessly retold among participants and observers involved in contemporary U.S. legal export and assistance efforts—about jet-setting, hit-and-run experts who have offered irrelevant, ineffective, widely ignored, or broadly resented advice.<sup>249</sup>

Another related, and more disputed, process lesson is that U.S. programs to provide legal assistance and efforts to export U.S. legal models are more likely to be effective if providers are familiar with the language, culture, laws and other conditions and traditions of recipient countries. This precept about the value of “local knowledge” appears to have been incorporated in the methods of some of the more venerable and well-regarded U.S.-based and U.S.-supported programs. Examples include the Ford Foundation’s China programs and the Soros Foundation’s COLPI, which have had policies or practices of employing as field officers U.S. citizens (or foreign nationals) who have been fluent in host-country languages and have had formal training or experience in the affairs of the host country or region. Another, more modest example is CEELI’s preference for resident liaisons who have been competent in the local language (a preference that has been reflected in a somewhat controversial lowering of the relatively meager “practical legal experience” requirement for candidates with language skills). More generally, the same basic view of the importance of host-country-relevant skills seems to have been reflected in U.S. advice-providers’ relatively frequent reliance on expatriates or immigrants from recipient countries, locally hired staff and advisors, and U.S. legal academics with expertise in the law of the recipient country. Particularly in the case of law professors, such expertise almost inevitably has meant some sacrifice in the level of expertise in the substantive fields of U.S. law in which advice has been offered—a trade-off that sug-

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<sup>249</sup> See, e.g., Symposium, *supra* note 1, at 119 (noting the criticisms from recipient-country sources directed at foreign lawyer and law professor consultants who flit in and out in bubbles of affluence); Seidman & Seidman, *Drafting*, *supra* note 71, at 34-36 (arguing that in studying how to draft new law, advisors must be attuned to local institutional and social structures).

gests a perception that such "area specialist" abilities matter a lot in the enterprise of extending effective legal advice.

The widely perceived link between the Ford and Soros programs' "localism" and their apparent success, and the especially prominent roles and, by their own accounts, the unusually extensive influence of expatriate academic advisors in the legal reforms undertaken by their home countries (primarily in the CEE region) suggest points of empirical support for this third lesson.

This third process lesson perhaps comes through most clearly in accounts of the deleterious effects that have followed from a lack of local knowledge. The need to understand and to be able to work with local counterparts, conditions, and needs is yet another of the many morals that seem to emerge from the star-crossed visit of the photocopy-toting U.S. securities law experts to Mongolia and the ill-fated production of an English-language, one-size-fits-all constitution for a new European republic, the identity of which had barely registered with the would-be framer of its fundamental law. Self-deprecating retrospective accounts by U.S. legal experts of their naivete concerning local legal needs and circumstances during their initial trips to Central and Eastern Europe suggest that there has been a widespread problem of poorly aimed, irrelevant or even unintentionally perverse advice.<sup>250</sup> Such accounts also provide reasons to think that the problem likely has been going uncorrected and, indeed, unrecognized among less introspective and sensitive participants in the booming American legal advice-giving industry.

The conclusion that local knowledge is vital has been implicit in many of the criticisms leveled at CEELI for its reliance on lawyers with little country-specific knowledge or country-relevant skills to act as intermediaries between recipient governments and a pool of U.S.-based experts who have had even less familiarity with recipient countries and their laws. These points are echoed in criticisms of USAID missions in the CEE/NIS region as "bubble colonies" unable or unwilling to understand their environments, and in indictments of funding entities for giving grants or awarding contracts to intermediary organizations that

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<sup>250</sup> See, e.g., Symposium, *supra* note 1, at 132 (stating that Judge Wald was impressed by the high number of women judges in Eastern Europe, only to be told that this was because it was considered a low-status job, and citing other examples of American surprise at different judicial norms and customs in Eastern Europe).

have known too little about host country conditions to be effective.<sup>251</sup> The same view comes through even more strongly in scathing accounts, by observers and from participants in other modes of U.S. legal assistance, of the impracticality or offensiveness of much of the advice offered in one-off lectures and short-term seminars given by providers who had been chosen solely on the basis of their expertise in particular fields of U.S. law or their prominence in the academic, private practice, or government sectors of U.S. legal circles.

A final “process” lesson teaches that U.S. legal assistance programs and efforts to export U.S. legal models are more likely to succeed if they eschew detailed, distinctively U.S.-derived prescriptions in favor of presenting advice or exemplars in terms of more “general” standards, “international” norms, “universal” principles, or in some contexts, specific solutions that are not peculiarly American. This lesson too has been a subject of considerable agreement among U.S. providers of legal advice and assistance. In China, for example, the Ford Foundation, Asia Foundation and other efforts have construed their “rule of law” agendas broadly, to include support for locally run—and sometimes locally designed—programs of legal training and research that have held forth no special promise of promoting emulation of U.S. models. Ford Foundation-supported efforts to publish and distribute books on general and comparative legal subjects and to compile collections of Chinese cases have, as a matter of policy or practice, steered away from narrowly American-style content. The largely American-staffed UN program to improve legislation-drafting capacity in the P.R.C. presented U.S. models as appropriate fodder for a comparative, social-scientific inquiry into suitable approaches to law-making, but not as paragons suitable for copying. The Asia Foundation’s parliamentary projects in the surrounding region have reflected a similar perspective in their emphasis on intra-regional exchanges and training, rather than visits to the United States or visits by U.S. experts on legislative processes. These projects that, in effect, have followed the fourth process lesson are among the U.S. legal assistance undertakings that generally have received substantially above average marks from participants and observers.

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<sup>251</sup> See CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 15, at 107-12.

Among efforts that have targeted the CEE/NIS region, seminars introducing general international standards and practices in foreign investment law have been especially popular and have been regarded as among the most successful of the Commerce Department's many programs promoting economic law reform in the region. Some U.S. participants in, and commentators on, the controversial field of antitrust law assistance have argued that U.S. public sector advice should contain a substantial mixture of European-style competition law if it is to be relevant and influential.<sup>252</sup> CEELI has included a commitment to providing "neutral" or "comparative" (rather than narrowly American model-based) advice among its core principles.<sup>253</sup> In many cases, CEELI has supported the offering of advice that has been based on Western European models that CEELI leaders and spokespersons have declared more suited to recipients' needs and inherited systems. Also, the Soros network's legal "text" projects have shared many of the "generalist" traits of the similar Ford Foundation-supported efforts in China, and seem to have enjoyed similarly favorable reputations and results.

Individual American participants in, and observers of, U.S. public and private sector efforts to provide legal assistance and to, support law reform in, the former Soviet world and the P.R.C. have expressed similar views. Many of them have argued strongly in favor of broad and fairly generic legal standards over detailed or U.S.-style rules in fields as varied as the regulation of economic competition in CEE and NIS and intellectual property protection in China.<sup>254</sup> In addition, the apparent and reported relative success of programs that have responded to local initiatives or agendas that have focused on technical legal assistance and techniques of legislation, offer further indications that assistance and export

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<sup>252</sup> See Fox, *ABA*, *supra* note 214.

<sup>253</sup> See, e.g., Symposium, *supra* note 1.

<sup>254</sup> See Fox, *Toward World Antitrust*, *supra* note 86, at 19-25 (arguing for neutrally-defined market access standards which would be monitored by the WTO); Paul H. Brietzke, *Designing the Legal Frameworks for Markets in Eastern Europe*, 7 *TRANSNAT'L LAW.* 35, 36-51 (1994) (arguing that partly privatized social democracies are more suitable for developing markets in Eastern Europe rather than neoclassical, wholly privatized liberal democracies).



efforts can be more successful when they avoid narrowly and obviously American prescriptions.<sup>255</sup>

The virtues of offering actually or apparently “generalist” prescriptions seems to be born out by phenomena beyond the sphere of formal U.S. advice and assistance programs. Anecdotal evidence suggests that, other things being equal, transactional contacts between U.S. lawyers and P.R.C., CEE or NIS lawyers and officials, and educational interactions between U.S. law teachers and Chinese or post-Soviet students have been more effective means for the transmission of broadly U.S.-style legal ideals when they have not taken the form of dictating obviously and specifically U.S. norms that “must” be followed if a deal is to go through, or if recipient country legal reform is to be effective. Also, even when threatening sanctions to pressure post-Soviet or P.R.C. leaders to alter their domestic laws in ways demanded by the U.S., the U.S. government appears to have acted at least partly in accordance with this final process lesson. For example, in the highly contentious and confrontational case of U.S.-P.R.C. negotiations over intellectual property protection, the U.S. usually has pressed China to meet the general, international—and certainly not distinctively American—standards of the Berne Convention.

Whatever the affirmative merits of “generalist” approaches, U.S. advice-providing and model-exporting efforts that have not adhered to this fourth process lesson appear to have run into greater difficulties, and to have drawn widespread and vehement criticism. Perceived attempts to provide the legal equivalent of U.S.-produced “turn-key” plants have been routinely attacked as hopelessly ineffective, as well as objectionably imperialistic.<sup>256</sup> The tale of how copies of U.S. securities laws and regulations may have eased the Mongolian paper shortage, but accomplished little else, and the story of how the elaborate draft constitution for the “Republic of \_\_\_\_\_” somehow failed to be enacted, make the point in especially colorful ways. In the same general vein, a lead-

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<sup>255</sup> These issues are addressed in the discussion of the first “process” lesson above, and the discussion of seemingly “apolitical” “technical” legal advice in the third “substantive” lesson below.

<sup>256</sup> Cf. JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS & FOREIGN AID IN LATIN AMERICA* (1980) (arguing that a process of “indirect infused transfer” of legal values would be more effective than attempts to transfer specific legal institutions, instruments, concepts or models, attempts to impose models, or attempts to respond passively to requests).

ing U.S. participant in the program to improve legislation-drafting in China has roundly denounced as ineffective and, at times, perverse the approach to assistance that assumes that American and other foreign legal consultants provide a "treasure chest" of specific solutions to recipient countries' legal needs.<sup>257</sup> Similarly, CEELI's critics have stressed that the organization's background papers and commentaries on draft legislation often have read like primers on American law.<sup>258</sup> And the critics have argued that it is these traits that have made such advice irrelevant and ineffective. Frequently, assessments of U.S. government efforts to export U.S. antitrust law and detailed U.S. models in other legal fields (especially to the former Soviet Bloc) have concluded that the narrow American focus of the prescriptions made the advice ill-suited to recipients' needs and circumstances, and ultimately ineffective.<sup>259</sup> In the same vein, critiques of the United States' relatively disappointing efforts to press the P.R.C. to adopt reforms to intellectual property law or trade law have traced the difficulty partly to the U.S.'s insistence that Beijing implement fairly specific standards that are familiar to the United States and alien to China.<sup>260</sup>

This process lesson seems more convincing in light of three plausible explanations of why U.S. legal assistance programs and other endeavors to export U.S. legal models might be more effective when they forego, or at least appear to avoid, highly detailed and specifically U.S.-modeled prescriptions. First, more general standards are more likely to be implemented by China, CEE/NIS, and other "post-communist" or "non-Western" states. Almost tautologically, implementation is a less complicated and less involved task where the advice is less elaborate. More subtly, advice and models that mandate only general goals or principles

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<sup>257</sup> See Seidman & Seidman, *Drafting*, *supra* note 71, at 34-36, 40.

<sup>258</sup> For an example of how similar these are to U.S. laws, see American Bar Association Central and East European Law Initiative, *Money Laundering: A Concept Paper for the Government of Bulgaria*, 28 INT'L LAW. 835 (1994); Fox, *Selection of Antitrust*, *supra* note 214 (setting forth comments that include extensive background discussions and comparisons to the U.S.'s Sherman Act).

<sup>259</sup> See Waller, *Comparative Competition Law*, *supra* note 184, at 455 (arguing that the United States is out of step with the rest of the world's competition community and calling for a comparative approach to the formulation of competition policy); cf. Fox, *Toward World Antitrust*, *supra* note 86, at 19-25 (arguing for internationalization of a general market access principle).

<sup>260</sup> See Alford, *supra* note 243.

are relatively agnostic about detailed rules, and thus give recipients greater room to find and to choose the least disruptive and most easily implemented specific options among those that are consistent with the general standard. Second, advice and models that are openly and obviously rooted in U.S. principles and practices are more likely to face resistance in recipient or importing countries. Such prescriptions for law reform are apt to encounter debilitating charges that they are manifestations of U.S. legal imperialism, or means for pursuing U.S. interests at the expense of local needs and interests. Third, the U.S. common law system and other aspects of American legal exceptionalism mean that advice and export efforts that push for distinctively U.S.-based solutions are more likely to be dismissed as irrelevant in the overwhelmingly “civil law” recipients of U.S. legal aid and assistance. Although the extent of the relevant differences between the two great legal families often is overstated, the perception that common law-based prescriptions are problematic appears to be fairly strongly held in Central and Eastern Europe (where, according to some critics, Western European aid programs have done much to encourage the view). Some version of this view also appears to have significant support—and arguments in its favor seem likely to be persuasive—in China and much of Asia (including parts of the former U.S.S.R.), where civil law systems predominate and legacies of direct and indirect continental European legal influence linger.

The persuasive power of these four “process lessons” depends, in part, on one’s notion of what counts as “success” or “efficacy” in U.S. legal advice programs and in the export of U.S. legal models. In some cases, legal advice and export-promotion efforts that fail to respond to local preferences, eschew collaboration with local elites and institutions, seek quick fixes, ignore questions of how to present advice in terms (and even languages) that will be welcomed and understood, and seem to insist upon fidelity to U.S. exemplars and prescriptions will appear thoroughly inappropriate, incomprehensible, uninspiring, or offensive. Where they do, they will clearly be doomed to abject failure, and approaches that do more to follow the four process lessons will offer clearly superior alternatives.

Often, however, heeding these lessons is likely to entail a trade-off. Legal assistance and export strategies that are responsive and collaborative, that are the product of lengthy experience

and effort, that incorporate insights drawn from an understanding of recipient-country languages, contexts and legal traditions, and that cast prescriptions and suggestions for legal change in generic or universal terms may be more likely to move the recipient system in generally "favorable" or desired directions. But such heightened prospects for "success" of some sort can come at a significant cost in terms of the "type" or "quality" of the results because the influence or impact of such efforts, when successful, generally will not produce states that closely resemble U.S. prototypes or the specific, concrete aims of contemporary U.S. legal assistance programs and other U.S. efforts to secure legal change abroad. In such seemingly commonplace circumstances, the "thicker" one's conception of the legal and institutional requisites of the broadly shared U.S. goals of market economies, political democracy, and the rule of law, the more often one is likely to perceive a negative expected value in following the process lessons described above, and accepting the costs they exact in return for the promise of a potentially hollow victory.<sup>261</sup>

Moreover, in some contexts and with respect to some issues and types of advice, U.S. legal assistance programs and U.S. legal models have had significant impact abroad despite a failure or refusal to heed some or all these process lessons. This pattern suggests that the four lessons about process do not exhaust the general teachings of the recent experience of U.S. legal assistance programs and other channels for exporting U.S. legal ideas to the former Soviet world, the P.R.C. and elsewhere. Many of these other teachings are reflected in four "substantive" lessons that variously overlap with, complement, and set forth caveats to the "process" lessons.

### 3.2. "Substantive" Lessons: *Of Power, Prestige, Politicization and Parallelism*

U.S. legal models and the advice offered by U.S. legal assistance programs appear to have a greater impact when any of four conditions exist with respect to the legal or institutional questions at issue: the United States can and does exercise power to press the recipient or importing country to conform to U.S. advice or U.S. standards; the ideals embodied in U.S. models or advice en-

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<sup>261</sup> See Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 94-95.

joy especially high prestige in the recipient or importing country; following U.S. advice or emulating U.S. models does not appear to be a highly political or politically controversial move in the recipient or importing country; or relatively small gaps separate U.S. advice or models, on one side, and the recipient or importing country's prior laws and practices or its current goals, on the other side.

Several features of recent U.S. legal interaction with the P.R.C. and the countries of the former Soviet Bloc teach, or seek to implement, the lesson of the importance of U.S. "power"—in the broad sense of the capacity, whether by purposive action or through the relatively automatic operation of "structural" forces, to make a country that rejects U.S. advice or U.S. standards significantly worse off by imposing a sanction or denying a benefit.

Outside of legal assistance programs, the U.S. government often has used its legal and constitutional authority to deny foreign states and their nationals access to U.S. capital markets, products markets, and various forms of economic assistance. In dealing with China, for example, the United States has used the threat of economic sanctions or continuing to block China's entry into the WTO to extract commitments from the P.R.C. to bring its intellectual property regime and its trade laws and practices into line with international standards. The threat of withdrawing MFN status, opposing multilateral economic assistance, or legislating codes of conduct for U.S. multinational corporations arguably has induced China at least to engage in a discussion of issues of reforming laws and practices that affect human rights. In a similar fashion, U.S. efforts to promote a variety of legal reforms in the CEE/NIS arguably have made greater headway because of U.S. laws that have conditioned economic assistance and trading opportunities for some former Soviet Bloc countries on, among other things, their progress toward market economies, democracy, and observance of human rights standards. The U.S. government's move to extend the reach of U.S. securities and anti-trust laws to cover activities and parties abroad appears to have reflected a similar, but somewhat more subtle and less region-specific, exercise of U.S. power to push other countries' laws toward conformity with U.S. standards. More broadly, the shadow of possible U.S. "sanctions" (broadly defined) very well may have led some CEE/NIS or P.R.C. officials to take more seriously some of the law reform prescriptions offered by U.S. legal advi-

sors, especially when such advice has been offered through official assistance programs and when it has concerned issues that have been important to the U.S. government or its leaders' key constituencies.

As this last point suggests, much of the impact of U.S. power in promoting U.S.-style or U.S.-favored legal changes in the P.R.C. and CEE/NIS regions seems to have come without U.S. actors' taking openly and obviously assertive measures. In China and in the former Soviet world, countries' and companies' quests for access to U.S. investment capital and U.S. capital markets have been a significant force for legal change. Chinese and Russian enterprises, plus some companies from other CEE/NIS and East Asian countries, seeking to list on the New York Stock Exchange have been willing to bring some of their practices into at least apparent conformity with the exchange's rules and the applicable requirements of U.S. securities laws. Such developments have created the basis for a mild ripple effect, with the actions of such pioneer companies having some impact on other aspects of the same companies' behavior, on the practices and standards of other companies that have wished to follow the rush for U.S. capital, and even on the attitudes and orientations of securities regulators at home.

Lawmakers and regulators in the P.R.C. and the NIS and CEE countries also have moved, albeit incompletely and sometimes grudgingly, to accommodate U.S. investors' demands for relatively familiar and broadly U.S.-like laws, apparently because governments in those external capital-seeking countries have seen such changes as a necessary condition for attracting U.S. investment. Thus, for example, accounts of foreigner-friendly reforms in China's joint-venture and other foreign investment laws suggest that advocacy by the U.S. China-Business Council and U.S. firms, as well as the U.S. embassy, may have made a difference.<sup>262</sup> Tellingly, some of the legal advice efforts that U.S. government providers have regarded as most successful are those which have held out the prospect of helping recipient countries to improve their access to U.S. capital and other sources of international investment. Examples, primarily from among projects targeting CEE/NIS governments, include seminars on foreign investment law operated by the Commerce Department's CLDP, and a vari-

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<sup>262</sup> See PEARSON, *supra* note 115.

ety of economic law advice projects on subjects ranging from bankruptcy to securities disclosure that have presented proposed reforms in terms of the appeal to, or demands of, foreign investors.<sup>263</sup>

Variation by subject matter in the impact of U.S. legal models and U.S. legal advice on developments in the CEE/NIS and P.R.C. further suggest the importance of “power”—in particular, the “passive” or “structural” forms of power often at issue in questions of access to U.S. capital and markets. One would expect the power of U.S. exemplars or prescriptions to effect (or at least affect) such change abroad to be highest where the laws at issue regulate objects that are relatively mobile (such that a choice of a particular set of legal rules would be likely to affect their location and allocation), where there appear to be large network externalities to a mode regulation (such that a national legal regime’s failure to conform to a standard model will be potentially isolating and costly with respect to attracting or retaining mobile factors) and where U.S. sources and regulators control an exceptionally large share of the object being regulated or the field of regulation (such that the U.S.’s legal approach has market power and/or provides a superior coordination point for initially inefficiently disparate national approaches). On each of these indices, capital/equities markets, product markets and business regulation, and workers/citizens’ rights and political-governmental structure arguably are arrayed consistently along a spectrum of declining U.S. “power.”

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<sup>263</sup> See Bufford, *supra* note 53, at 463-65 (indicating that developments in bankruptcy law in CEE countries, which have to a significant degree followed U.S. models, are helping raise capital by privatizing insolvent state-owned enterprises); Anna M. Han, *China’s Company Law: Practicing Capitalism in a Transitional Economy*, 5 PAC. RIM L. & POL’Y J. 457 (1996); *Legislative Strengthening in Poland*, *supra* note 17; *Commercial Law Development Program*, *supra* note 18 (describing a seminar on project finance); Andrew Xuenfeng Qian, *Why Does Not the Rising Water Lift the Boat? Internationalization of the Stock Markets and the Securities Regulatory Regime in China*, 29 INT’L LAW. 615, 625-28 (1995) (comparing Chinese regulations and the Western securities regulations upon which they were modeled); Belcuore, *supra* note 23, at 462-65 (discussing how reform in Kazakhstan encourages U.S. companies to invest in that country). See generally William C. Philbrick, *The Paving of Wall Street in Eastern Europe: Establishing the Legal Infrastructure*

Accounts of recent legal changes in the P.R.C., the former Soviet Bloc and other countries in transition are consistent with a conclusion that the impact of U.S. advice, demands, and models have tracked this same spectrum. As the relative paucity of identifiably American-inspired provisions in P.R.C. and post-Soviet constitutions' structural and rights-enumerating provisions (as well as the dead-on-arrival status of the American-drafted, fill-in-the-blank constitution for a post-Soviet republic) and the more numerous, if scattered, instances of broadly U.S.-style provisions in laws on foreign investment, corporate governance, equities, bankruptcy, and antitrust all suggest, U.S. paradigms and prescriptions appear to have had more of an impact with respect to "economic law" than "political law." Inflated claims from some U.S. consultants aside, credible assertions of American paternity for constitutional developments in these countries have been few, while commentators and participants have concluded, plausibly, that there has been a better record of success among economic law-focused efforts operated by CLDP, USAID, the SEC, the Department of Justice with the FTC, and other private sector aid-providers.<sup>264</sup>

Within the broad field of "economic law," U.S. exemplars and advice appear to have been relatively influential in the P.R.C. and CEE/NIS regions with respect to some aspects of securities regulation and capital markets law, somewhat less influential in fields such as intellectual property, insolvency, and competition law (with some of their effect in these fields being attributable to their close connection with international investment and trade), and much less influential in areas more closely connected to such less tradable factors as "people" and domestic governance (with important examples including issues of labor law and provisions governing individual economic liberties).<sup>265</sup> The conclusion that there has been a relatively high level of influence in laws relating to capital is complex, potentially controversial, and requires a ca-

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<sup>264</sup> See Bufford, *supra* note 53 (regarding bankruptcy laws).

<sup>265</sup> See Taylor, *supra* note 222 (regarding securities laws); Mastalir, *supra* note 163, at 61 (regarding the likely impact of U.S. and E.C. antitrust law on the transition to market economies in Eastern Europe); Hu, *supra* note 127 (regarding the modest impact of MOUs on P.R.C. copyright law). See generally Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 221-23 (1994) (arguing that ideas about copyright espoused by the Berne Convention should be left open-ended in developing copyright law in China).



veat in light of persisting U.S. and other Western investors' criticisms of the lack of transparency, stability, and fairness of stock markets in China and the former Soviet world. The move toward U.S.-style law and regulation in these areas has been significantly compartmentalized, with relatively extensive changes occurring in semi-segregated markets for foreigners or in those aspects of regulation that have been of greatest immediate concern to foreign investors.

Given that U.S. legal assistance programs seem to have spread their resources relatively evenly across these different types of economic and non-economic legal fields, it appears likely that U.S. "power" (in particular, "passive or "structural" power)—and not the level of effort expended by aid-providers and model-exporters—can account for some of the variation in effectiveness of U.S. advice and the influence of U.S. models. Quite plausibly, U.S. government and foundation-supported advisors may have been taken more seriously in the reform-era P.R.C. and in the post-Soviet world when their advice and ideals have appeared to provide guidance on how to gain access to valuable economic resources that the providers' government or fellow nationals controlled. Indeed, U.S. participants sometimes have played the "power" card fairly explicitly. Even beyond the obvious contexts in which official government actions to impose sanctions or deny benefits have been at issue, U.S. officials, American lawyers, and legal academics who have urged the adoption of American-style commercial law and other economic laws, or conformity to broadly U.S.-like international practices in these fields, routinely have invoked the point that the U.S. and international markets for investment can be expected to respond unfavorably to post-socialist or reforming socialist states' failure to heed such advice.

Cross-national variations in the adoption of U.S.-style economic laws also suggest the importance of power, broadly defined. While areas with relatively open and/or developed economies, including the nations on the Western fringe of the CEE region and the P.R.C. (especially its coastal regions) have moved relatively far in this direction, other parts of the post-Soviet or reforming socialist world have not, as the Mongolian securities law reformer's reaction to the U.S. lawyers' offer of assistance poignantly illustrates. It seems probable that the differences may stem at least in part from the "power"-related fact that those nations and regions which have been more ready to adapt to U.S.-

style rules would have faced more obvious, and severe immediate economic costs of exclusion from world markets if they had refused to do so.

Patterns in informal channels for the transmission of U.S. legal models to the P.R.C., CEE, NIS and elsewhere appear to offer additional support for the same general lesson. Typically not having presented themselves principally as providers of aid or advice on law reform, practicing U.S. lawyers likely have won the attention and influenced the thoughts and actions of their foreign counterparts and law-making officials—to the extent they have done so—because they have been perceived as gatekeepers to capital, export markets or (more diffusely) respectability in the U.S. and around the world. More subtly and possibly more insidiously, lawyers from China and from the former Soviet Bloc who have spent extended periods in U.S. law schools (or in U.S. law firms) have had to think, to some degree, like American lawyers (or at least like American legal academics think American law students should think). The power of the U.S. parties to these relationships to grant or withhold degrees, good grades and other elements or indicia of academic and professional success no doubt has been a significant factor in pressing the visiting lawyers from these systems to analyze and to understand legal questions in terms of U.S. laws and legal ideas, perhaps sometimes with lasting effects.

A second substantive lesson teaches that U.S. legal assistance programs and U.S. legal models are more likely to have an impact where the ideas they urge and embody enjoy especially high “prestige” among recipients of advice and potential emulators of U.S. examples. While the meaning and sources of the prestige of legal models and ideals can be elusive, prestige does seem to matter in the process of legal export or transplantation generally.<sup>266</sup>

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<sup>266</sup> For discussion of the role and importance in legal borrowing of a donor’s “authority” in the recipient system, see *Aspects of Reception of Law*, *supra* note 242. See also ALAN WATSON, *LEGAL TRANSPLANTS*, 57, 90 (1994) [hereinafter WATSON, *LEGAL TRANSPLANTS*]. Watson also argues that, where lawyers are involved, the professional habit of not wanting to be obviously innovative and wanting to claim external authority for statements makes available prestigious foreign models especially appealing. See *id.* at 95-101. Watson’s argument, which suggests that the “accessibility” of knowledge about the donor provides a better predictor than the “fit” between the donor and recipient system of whether borrowing will occur, suggests the importance of prestige in enhancing visibility which, in effect, makes the prestigious exporting system more accessible. See *id.* See generally, Joan Davison, *America’s Impact on Con-*

The recent experiences of U.S. legal advice, assistance and export efforts in China and the former Soviet Union and neighboring nations do not seem to be exceptions to the broader pattern. Some assessments of constitutional change in the CEE/NIS region, for example, have suggested that local perceptions of the United States as a paragon of constitutional rule and limited government have been important factors in making U.S.-style notions of checks and balances, separation of powers, and enumerated individual rights attractive to post-Soviet constitution-makers, despite the apparent foreignness and seeming irrelevance of U.S. legal traditions and current circumstances.<sup>267</sup> The close association that some legal and reformist elites in China and the former Soviet world have perceived between the U.S. legal system and ideals of the rule of law and judicial independence— and perhaps a more general perception of the United States as the “intellectual leader” in Western law during the late twentieth century— may have contributed to the relatively warm welcome and favorable evaluations received by U.S. legal assistance efforts that have focused on increasing the autonomy and competence of bench and bar and cultivating rule of law values in the P.R.C. and CEE/NIS regions.<sup>268</sup>

The United States’ position as the largest and, in recent years, the most dynamic of the advanced market-capitalist economies

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*stitutional Change in Eastern Europe*, 55 ALB. L. REV. 793 (1992) (describing how Eastern European countries study Western democratic systems in order to draft new constitutions).

<sup>267</sup> See Ajani, *supra* note 261, at 94-97 (suggesting that developing laws within CEE countries have been shaped initially by the wholesale adoption of Western law and more recently by a critical analysis of Western laws); Ludwikowski, *supra* note 138, at 159.

<sup>268</sup> On at least one account, it is precisely at this level of exporting “ways of thinking about law” as a “phenomenon of social organization” that the U.S. exercises its role of “intellectual leadership” in law. See Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994) (reviewing *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920* (Mathias Reimann ed., 1993) and *DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND* (Marcus Lutter et al. eds., 1993)) [hereinafter Mattei, *Intellectual Leadership*] (arguing that the U.S. has replaced Germany, which had replaced France, as the intellectual leader in Western law); Symposium, *supra* note 1, at 122-27 (statement of Dimitrina Petrova) (praising Western Lawyers for bringing CEE lawyers an appreciation of judicial independence and a sense of social responsibility to their work and for positively influencing Eastern European legal systems).

appears to have generated analogous—and perhaps stronger—“prestige” effects in fields of economic law. The international status that this prominence and dominance has given American advice or models arguably has been a significant factor in pushing the P.R.C. and former Soviet Bloc nations to look to some aspects of U.S. securities, competition, and bankruptcy law despite the presence of formidable economic incentives and political pressures to emulate and to seek integration with neighboring market economies that have legal systems which differ from the U.S. model in significant and relevant ways.<sup>269</sup> As some prominent participants and commentators have seen it, the relatively high degree of Chinese or post-Soviet interest in U.S. economic law has reflected, in part, a variety of prestige effects. These include a perception in some relevant circles in these recipient countries that U.S. models constitute the original source—and therefore, probably the superior version—of the European or industrial East Asian systems of market-oriented economic law that have been more close-at-hand and familiar for Chinese and ex-Soviet Bloc law-reformers.<sup>270</sup>

The lesson about the significance of prestige also provides a plausible, partial explanation for the apparent efficacy of some less narrowly advice-mongering and other relatively informal mechanisms for exporting U.S. legal ideas and ideals. A substantial prestige effect seems evident in the numerous anecdotal reports, especially from CEE lawyers and scholars, of how their involvement in a variety of programs and exchanges—including U.S. foundation-sponsored academic programs, U.S. government-sponsored or foundation-arranged visits to U.S. judicial and legislative institutions, and briefer exchanges with locally posted U.S. aid officers or visiting U.S. experts—contributed to a favorable transformation of their sense of professional role and prospects for autonomy and influence. On these accounts, such experiences made the participants feel “connected” or “a part of” a powerful

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<sup>269</sup> The most relevant neighboring systems are Japan and East Asia’s newly industrialized countries for China, and the European Union for the CEE states.

<sup>270</sup> See Symposium, *supra* note 1, at 140 (suggesting that since Western Europeans look to the United States in some instances, the CEE should receive legal principles straight from U.S. lawyers). But see Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3, 16 (1994) [hereinafter Mattei, *Legal Transplants*] (identifying parochialism and ignorance of the available alternatives as impediments to the adoption of efficient foreign models).

and appealing Western or international legal tradition in which the U.S. model has represented an important paradigm.<sup>271</sup>

To the extent that U.S. lawyers with P.R.C. or CEE/NIS-focused practices and U.S. law professors with P.R.C. or CEE/NIS students have been effective avenues for transmitting U.S. legal ideas and ideals to those countries, their ability to do so seems likely to have been, in part, a matter of the perceived prestige of U.S. models. That much, at least, is strongly suggested by the apparently widespread tendency, particularly among reform-oriented P.R.C. lawyers and officials with law-related portfolios, to regard U.S. (and other Western) laws as providing ideal prototypes that can be copied to achieve the desired results in the recipient country. The presence of a pronounced prestige effect seems to be confirmed by the persistence of this phenomenon despite the sometimes considerable efforts by U.S. consultants and professors to convince their recipient-country audiences that the U.S. models they have presented do not constitute a “treasure chest” or a “template” of ready-made solutions.<sup>272</sup>

A third lesson about the substance of U.S.-provided legal advice and U.S. legal models is that they appear to have more of an impact when their prescriptions for legal change are not highly “political”—in the sense of seeming either to advance a self-interested U.S. agenda, or to displace a recipient country’s sovereign discretion in making constitutional, legislative, or basic policy choices.

Much of the behavior that supported the “process” lesson concerning the wisdom of avoiding a too-obvious “made in America” label suggests that this “substantive” lesson is plausible and fairly widely accepted among U.S. participants and programs. That is, the importance of being, or appearing to be, “apolitical” seems to be borne out in the alacrity and apparent success with which U.S. providers of legal assistance and promoters of U.S. models have carefully selected or cleverly packaged their law reform prescriptions or their presentations of legal options to emphasize generic, international or universal principles, and thereby to minimize the risk that recipients will perceive the advice or ex-

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<sup>271</sup> See *Symposium*, *supra* note 1, at 122-31, 140 (arguing that such effects are important at a psychological level); CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 15, at 89-97; Paula R. Newberg & Thomas Carothers, *Aiding— and Defining— Democracy*, *WORLD POL’Y J.*, Spring 1996, at 97.

<sup>272</sup> See Seidman & Seidman, *Drafting*, *supra* note 71.

amples as politically offensive calls for replicating American choices or following American dictates.

The lesson about the virtues of avoiding "political" advice or models arguably also lies behind the tendency of USAID, the NED or other U.S. government agencies (and major U.S. non-profit organizations, such as the Ford Foundation or the Asia Foundation, that foreign recipients of legal advice have sometimes seen as closely associated with the U.S. government) to operate through a variety of indirect means. Common examples of this approach include making grants to private U.S. foundations, using private U.S. contractors or intermediary organizations, making grants to recipient-country NGOs, educational institutions, and other organizations, or crafting ad hoc arrangements for government-private collaboration. Among other advantages, such methods of operation have promised to keep the role of the U.S. government (or other controversial U.S. actors) in the background and thus to dampen recipient country suspicions that ostensibly benevolent assistance has been a vehicle for U.S. interests.

To the extent that informal channels for transmitting U.S. legal ideas and ideals have been relatively effective, they may have succeeded in part because they have appeared to be "apolitical." U.S. lawyers who have assisted in dealings between U.S. or other foreign parties and P.R.C. or ex-Soviet Bloc counterparts (and sometimes have supplemented transactional work with mini-tutorials in the law-related expectations of the Western party) often have not seemed to be promoting a "political" U.S. agenda, even though they typically have been representing American clients. At least in the P.R.C. case, the status of some of the more prominent U.S. lawyers as established scholars of Chinese law or "friends of China" has reinforced this impression of, at worst, the political neutrality of their motivation in offering access to U.S. models or providing advice on legal reform. Among the somewhat self-selected group of CEE, NIS, and Chinese lawyers who have come to U.S. law schools and who often seem to have absorbed a good deal of U.S. legal ideas and ideals, an apparently widespread perception that their teachers have not been agents of a quasi-official or orchestrated U.S. agenda very well may have contributed substantially to the efficacy of U.S.-based and American-run educational programs as a medium for disseminating U.S. legal models.

The notion that apparently non-political prescriptions and exemplars fare better also draws support from the relatively extensive resources, and generally favorable reviews, accorded to U.S. legal assistance programs that have offered advice on highly technical matters of economic regulation, or have provided training in techniques of legislation, regulation or adjudication. Examples of the former approach in programs targeting the CEE/NIS region include the Commerce Department's CLDP seminars on project finance and other aspects of foreign investment law, the Justice Department Antitrust Division and FTC programs on competition law, and some of CEELI's background papers and draft legislation reviews. Among programs focusing on China, examples of this approach include SEC technical assistance efforts, PTO training programs, and private foundation-supported programs on a variety of economic and regulatory topics. These and other "technical" economic law programs generally have been regarded by participants and observers as among the more successful of U.S. advice efforts in both regions.

Examples of the latter, "technique-teaching" type of approach include the many government and foundation-supported projects (with participants ranging from USAID and USAID-contractors to an American-led and American-staffed UNDP program to CEELI to the Asia Foundation and the Ford Foundation to smaller private-sector organizations to U.S. courts and Congress to numerous federal regulatory agencies) that have sought to strengthen and increase the competence of legislatures, legislative staffs, and legislation-drafters, and to provide technical competence-centered formal training, visiting, and exchange programs for judges, lawyers, and occasionally economic law-related regulators and enforcement officers from across the former Soviet world, China, and some of China's neighboring states. In recent years, programs to increase the technical competence and capacity of local government in China and the CEE region have been added to the mix, with the Ford Foundation and a number of smaller U.S. foundations taking the lead. Like "technical" economic law advice projects, these programs too have received relatively high marks from participants and commentators. Examples from the legislative sector suggest the broader pattern. The UNDP program for China has been credited with breaking the "legislative log-jam" that prevented the enactment of much crucial economic legislation and with markedly improving the

P.R.C.'s law-drafting processes.<sup>273</sup> The Ford Foundation-supported Parliamentary Practices Project for the CEE region has also garnered a favorable reputation for legislative-strengthening.<sup>274</sup> CEELI's devotion of greater resources to projects targeting legislation-drafting and legislative processes suggests that CEELI shares the view that such "technical" advice is especially effective.

It seems quite plausible that U.S. assistance programs or export efforts that have emphasized such "technical" or "technique"-focused advice have received warm welcomes (and thus enjoyed better prospects for success) in part because they have benefited significantly from the perception—accurate or not—that technical matters of economic regulation are dictated by iron economic laws or the impersonal forces of international markets, and that techniques of effective law-making, regulation, adjudication, and lawyering are neutral tools or reflect generally applicable lessons drawn from social-scientific insights. Anecdotal evidence—including, first, the views embraced by some reformist lawyers and U.S.-educated students from CEE/NIS and the P.R.C. that U.S. and other Western laws reveal a straightforwardly applicable formula for adequate and effective laws on any number of topics, and second, the frustrations experienced by U.S. advisors and educators who have sought to convince lawyers and officials from post-communist or reforming socialist states of the error of such views—suggests that this phenomenon has been fairly widespread.<sup>275</sup>

Where such perceptions hold sway, accepting U.S.-provided or U.S.-supported advice or imitating U.S. models on technical matters and matters of technique can be relatively unobjectionable. Emulating U.S. examples or following U.S. prescriptions can seem to involve either making no choice at all or making the only instrumentally rational choice. The content of the advice followed or the model imported does not appear, in any meaningful sense, distinctively "American." The relatively narrow and specialized questions addressed in "technical" assistance, and the

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<sup>273</sup> See Ann Seidman & Robert B. Seidman, *Not a Treasure Chest, a Tool Box: Lessons from a Chinese Legislative Drafting Project*, in LEGISLATIVE DRAFTING FOR MARKET REFORM 33 (Ann Seidman et al. eds., 1997) [hereinafter Seidman & Seidman, *Tool Box*].

<sup>274</sup> See QUIGLEY, *supra* note 31.

<sup>275</sup> See Seidman & Seidman, *Tool Box*, *supra* note 273.



apparently indirect and indeterminate impact on substantive legal rules of law-making or law-interpreting “techniques,” suggest that importers of such types of U.S. legal models and recipients of such types of U.S. legal assistance may be able to incorporate suggested reforms without having to challenge or to question openly many of the basic features or the broad characters of their existing legal systems.

The lesson seems to have resonated with many U.S. advisors and aspiring model-exporters, who seem to have taken it to heart. Notably, the effort to “sell” CEE, NIS, and P.R.C. audiences on U.S.-style competition law or U.S.-style constitutional provisions has been cast in quasi-scientific or social-scientific terms. Frequently the argument has been that the proposed reforms, which happen to track U.S. models, should be accepted because they will be best— or uniquely— able to achieve the goals of maintaining competition in an emerging market economy or political accountability and checks on tyranny in a democratizing or liberalizing polity.

The lesson about the advantages of “apolitical” advice and models draws additional force from the relatively great difficulties and resistance encountered by U.S. legal examples and U.S. legal assistance efforts that have been nearer the other end of the spectrum of perceived politicization. A significant problem for U.S.-provided or U.S.-derived prescriptions even in such “scientific” fields as economic regulation or techniques of law-making has been that they sometimes have been so highly detailed and obviously American that they have sacrificed the aura of neutrality and necessity and have appeared to demand that recipient states make a particular— and political— choice among a number of potentially feasible options.

Many examples could illustrate this phenomenon, but the effort to export U.S.-style antitrust law may provide the most dramatic instance. The zeal with which some U.S. officials and their supporters pushed for wholesale emulation of the Sherman Act and rejection of alternative, European style approaches very well many have accounted for some of the difficulties that their recommendations ultimately encountered, particularly in the CEE and NIS region. Where pretensions to technocratic truth are thus undermined, the choice to follow U.S. advice or an American example can easily appear to be a broadly “political” one which is properly the province of the recipient nation’s political processes,

and which, if ceded to U.S. providers or models, risks being decided in a way that serves U.S. government or U.S. private sector interests rather than recipient country needs. Tellingly, this problem seems to have been more serious when Western European or East Asian sources have presented target countries in the CEE/NIS or P.R.C. regions with alternative models or advice, as arguably has occurred in such fields as trade and investment regulation, securities regulation, intellectual property law, intra-parliamentary structures, and formal processes, and perhaps most clearly, competition law (where some U.S. advice-providers, in battling the "export zealots," have joined a chorus of European colleagues in urging CEE states to harmonize their regimes with EU standards).

Moreover, one of the most intractable obstacles facing distinctively American models or U.S. programs of advice on specific constitutional principles, laws governing citizens' rights and the like seems to have been a perception in recipient countries that such models and programs have threatened to usurp or distort core exercises of the recipient government's discretion or the nation's sovereign or popular will. Here too the availability of alternative models of effective constitutionalism in nearby nations may have reinforced such views. Sometimes the concern appears to have contributed to moments of serious tension and confrontation. One notable example has been official P.R.C. sources' denunciation of various U.S. calls for human rights-protecting changes in Chinese laws as impermissible attempts to interfere in China's exercise of its domestic sovereignty. Another specific incident has been the reaction in Romania to a NED-sponsored program that purported to offer general parliament-strengthening and pro-democracy assistance, but that was seen as taking sides with an opposition party and against the ruling party.<sup>276</sup> A more widespread and diffuse, but broadly similar, phenomenon has been the emergence in many parts of the former Soviet Bloc and East Asia of "cultural relativist" arguments (whether Slavophile or Sinical) against the relevance of U.S. and other Western-style notions of constitutions, rights, and the rule of law.

Understood in such terms, the relatively unhappy fate of the most "political" of U.S. legal models and advice to the Chinese and former Soviet worlds replays a venerable thesis of compari-

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<sup>276</sup> See CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 15.

son that parallels the third substantive lesson of the recent experience of U.S. legal assistance efforts and the export of U.S. legal ideals: compared to “private” or “economic” law, constitutions and “public” or “political” laws are more frequently home-grown and less readily transplanted or borrowed across legal systems.<sup>277</sup>

Finally, there is the seemingly banal, but important, lesson of “parallelism”: U.S. legal models are more likely to be emulated and U.S. providers’ legal advice is more likely to be followed when the substance of the U.S. prescriptions or American templates is relatively compatible with the recipient nation’s preexisting system or its agenda for legal reform.

One simple idea behind this lesson is that legal borrowing or following foreign instructions can be efficient because it saves the recipient system the cost of having to design a set of legal rules or a legal regime. The costs of independent invention (including the “trial and error” of pursuing blind alleys already explored by others or the expenses of devising genuinely new laws and institutions) can easily outweigh the expected marginal gains to be reaped from a fully indigenously crafted arrangement that might better suit local needs and circumstances. Borrowing tends to become inefficient or impossible, however, when the salient differences between donor and recipient system are so great that transplanting a particular legal rule or institution would require radical changes in the recipient legal system. In such contexts, the project often can become unbearably disruptive and/or predictably not worth the cost.<sup>278</sup>

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<sup>277</sup> Watson generally endorses this view, quoting with approval the principle that societies invent their own constitutions and political systems but that their private law is “nearly always” taken from others. See WATSON, *LEGAL TRANSPLANTS*, *supra* note 266, at 8 (quoting S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW*, at ix (1969)). See also Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Mod. L. Rev.* 1 (1974) (expressing skepticism about the possibility of “borrowing” public/political law compared to the relative ease of borrowing/harmonizing economic law). In the same general vein, Watson argues that borrowing in the legal history of the West has been greatest in the private law realm and less in the public law realm, in part because governments thought the field sufficiently politically unimportant to leave the former realm to development by subordinate or unofficial lawmakers who were more open to, or more inclined toward, borrowing. See WATSON, *LEGAL TRANSPLANTS*, *supra* note 266.

<sup>278</sup> See WATSON, *LEGAL TRANSPLANTS*, *supra* note 266; Mattei, *Legal Transplants*, *supra* note 270, at 16.

When powerful or persuasive groups in the recipient country seek extensive or fundamental legal change, the calculus is somewhat different: if a legal rule, concept, or structure that might be borrowed fits well with the goals reformers seek to achieve, even transplants that would require radical change can be feasible and worthwhile. Radical reformers are, of course, already willing to accept the costs associated with wrenching systemic change, but they still could or (rationally) should welcome the modest savings that can flow from adopting and adapting solutions pioneered or proposed by outsiders, rather than "starting from scratch" or "re-inventing the wheel."

Several aspects of the recent career of exporting U.S. legal models or extending U.S. legal assistance to the P.R.C. and the CEE/NIS region seem to teach or to confirm the lesson of the advantages of congruity between U.S. models or U.S. advice, on one side, and the traditions or aims of recipients and potential importers, on the other. At the level of constitutional reform and other types of basic legal-institutional change, "parallelism" provides a plausible and fairly commonplace explanation of why such relatively distinctive American features as a tripartite separation of powers, federalism, extensive reliance on courts and lawyers, common law adjudication, and notions of transcendent individual rights have not been much imitated in the P.R.C., the former Soviet Union and neighboring states: compared to American approaches, the French and Westminster models of a strong central government, primarily parliamentary checks on the government, protection of rights principally or solely through positive law and legislation, and a more modest political and social role for lawyers have been more in step with the prior constitutional histories, as well as the post-socialist or reform-era aspirations, of those countries.<sup>279</sup>

Tellingly, when U.S. advisors have argued, often ineffectively, that CEE/NIS and other constitutional reformers should adopt U.S.-style provisions, they have cast their arguments partly in terms of parallelism. Examples include the assertion that an

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<sup>279</sup> Cf. Thomas M. Franck, *The New Development: Can American Law and Legal Instruction Help Developing Countries?*, in *LAW & DEV.* 3, 18-24 (Anthony Carty, ed. 1992); Ludwikowski, *supra* note 138, at 155; Jon Elster, *Constitutionalism in Eastern Europe*, 58 *U. CHI. L. REV.* 447, 465-70 (1991); Rudi G. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *Yale L.J.* 2009, 2067-70 (1997).

American-style presidential system would serve post-socialist or reforming socialist recipient countries' goal of avoiding the paralysis of a fragmented parliament in a fractious multi-party system, and the rather different claim that a constitutional order with a strong U.S. Congress-style legislature would serve such countries' goals of preventing a relapse into tyranny at the hands of an overweening executive.<sup>280</sup>

"Parallelism" finds additional support in the appeal and effect of constitutional or sub-constitutional U.S. examples and U.S. advice concerning the rule of law generally, limits to government powers, an independent judiciary, and an independent legislature with power-enhancing internal organizational structures, such as a strong committee system or a large professional staff.<sup>281</sup> As much of the evidence for the "process" lesson concerning the virtues of eschewing parochially U.S. style advice suggests, these less distinctively American elements in U.S. models and U.S. legal advice on constitutional and basic institutional matters may have appealed, in part, because they have seemed less alien to CEE/NIS and even P.R.C. traditions.

Similar aspects of U.S. models and advice also appear to have resonated strongly with the goals of many of these countries' reformers. Numerous anecdotal examples suggest the pattern: one reformer-lawyer from Central Europe stressed the invigorating and transforming effect on lawyers from her region of brief visits to the United States which provided exposure to a legal culture of lawyers as independent professionals and agents of social change.<sup>282</sup> Eastern European participants in COLPI programs for legal academics from across the region have offered similar praise for the access the program provided to a variety of rule of law ideas and like-minded colleagues.<sup>283</sup> Visits to the United States by delegations of CEE/NIS judges and legal educators have prompted similar assessments. In general, the numerous pro-

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<sup>280</sup> See Ludwikowski, *supra* note 138, at 170, 181-182, 251-255 (describing the appeal of U.S.-style presidential systems in CEE/NIS); Stein, *supra* note 140, at 438-452 (same).

<sup>281</sup> See *Judicial Reform*, *supra* note 149 (focusing on aspects of judicial independence with respect to which the common law/civil law divide is minimal); *Parliamentary Assistance in Nepal*, *supra* note 17; *Legislative Strengthening in Poland*, *supra* note 17. For accounts suggesting the U.S. impact on CEE/NIS constitutions in these areas, see HOWARD, *supra* note 3.

<sup>282</sup> See Symposium, *supra* note 1, at 122-27.

<sup>283</sup> See *id.*; COLPI Website, *supra* note 30 (concerning "Legal Education").

grams to strengthen the bench and bar seem to have won favorable receptions, or at least to have avoided the resistance that has greeted some U.S. efforts to encourage changes in substantive law. At least from the parochial and perhaps self-interested perspective of these potentially key legal reform elites, the U.S. advice being offered and the models being displayed in these programs and projects appear to have resonated strongly with the recipients' aspirations for legal change in their home system—a factor which doubtless has contributed to the U.S. advice and models' positive image and apparent efficacy.

Widely praised and highly-rated projects (operated by official, unofficial, and multilateral organization-based U.S. providers) that have sought to improve the quality of legislation and legislative processes in several CEE states, China, and some of China's neighbors point to the same basic lesson. Such programs—ranging from the UNDP project in China to USAID-sponsored work in Poland and Nepal, to the Frost Committee, Ford Foundation, and CEELI projects in the CEE/NIS region—appear to owe some of their favorable reception and their apparent success to the high degree of “fit” that recipient-country participants have perceived between their goals of strengthening their own law-making institutions and reforming their legal systems, and the skills taught or the values transmitted through the programs' training sessions, visits to the United States, and intra-regional tours and exchanges.<sup>284</sup> Here, too, as with efforts addressing issues of lawyers and the judiciary, the favorable reaction and seeming success doubtless stems in part from the sense of parallelism between the advice and models offered and the self-interest (enhancing one's own roles and powers) and parochial perspective (thinking that maximizing one's own roles or power would be a good thing) of the key segment of recipient country elites (parliamentarians and their staff) that has participated most directly in the programs.

In some cases, both the “forward-looking” and “backward-looking” (as well as the parochial) aspects of the power of parallel-

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<sup>284</sup> See Seidman & Seidman, *Drafting*, *supra* note 71; *Legislative Strengthening in Poland*, *supra* note 17; *Parliamentary Assistance in Nepal*, *supra* note 17; *Programs in Asia: China*, *supra* note 100; *Programs in Asia: Vietnam*, *supra* note 102; see also CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 15 (regarding Frost); QUIGLEY, *supra* note 31 (regarding Ford's Parliamentary Practice Project).

ism appear to have been at work, with U.S. advice or U.S. models dovetailing with the aims of recipient-country reformers who have cast their agendas of sweeping legal and institutional change as, in part, restorations of a legal profession or democratic institutions or a constitutional tradition that had been tarnished or trampled under socialist rule. The phenomenon is most pronounced in Hungary and other nations on the western fringes of the former Soviet world, where post-Soviet era leaders' claim to be recovering prior ways seems most plausible. More modest versions have sprung up elsewhere, however, even in China where the argument has been cast more in terms of what might have grown from the seeds that had begun to sprout during an earlier phase of openness to U.S. and other Western legal ideas and ideals at the turn of the last century.

The apparent success of "technique"-focused efforts to provide legal advice also arguably teach and confirm the parallelism lesson. U.S.-provided and U.S.-supported programs that have focused on transmitting and fostering seemingly neutral and adaptable professional skills to lawmakers, law-drafters, judges, lawyers, regulators, enforcement officials, and local government functionaries have addressed directly the needs and interests of key legal elites in recipient countries. These programs also have raised relatively few concerns about poor "fit" with the more obviously and immediately substantive elements of existing legal systems or with the basic laws and constitutional or quasi-constitutional institutions that reformers have sought to establish, modify, or preserve.

More broadly, the "social scientific" or "policy-instrumental" understanding of law that looms large in contemporary U.S. legal thinking may have made U.S. models relatively appealing to Central and Eastern Europeans, former Soviets, Chinese, and other East Asians who have sought to craft legal arrangements compatible with economic and political reform. To a significant degree, leaders and lawyers in those countries often share this understanding of the nature of law, occasionally to the consternation of those U.S. advisors and aspiring exporters of U.S. models who have argued either for a more autonomous or more variegated notion of law. Whether or not relevant recipient country elites subscribe to such a "theory of law," that conception's prominence in American legal analysis probably has increased the likelihood that U.S. legal ideas and U.S. legal advice have seemed relatively palat-

able. This palatability stems from the fact that they have not explicitly or obviously demanded a rethinking of the substantive ideas and ideals that animate the recipient country's existing legal system or its reform agenda.<sup>285</sup>

Interregional contrasts in the aims and impacts of U.S. legal assistance programs and legal models on constitutional design, law-making and law-interpreting institutions and other core rule of law concerns also suggest the virtues of a relatively high degree of fit with recipients' or importers' traditions or aspirations. Efforts to export elements of the American constitutional model have been conducted on a larger scale and have enjoyed greater success in the CEE/NIS region than in China and its region. This distribution of effort and apparent success may well reflect the existence, or the perception among U.S. advisors and potential exporters, of significant cross-national differences in the extent of parallelism. Compared to much of the former Soviet Bloc, China and many other East Asian nations have seemed farther removed from Western (and especially U.S.-style) constitutionalism and legal-institutional traditions. The level of interest in fundamental (and especially Western or U.S.-style) constitutional and "rule of law"-supporting reform has seemed higher among powerful political leaders or relevant social groups in many parts of the former Soviet world than in the P.R.C. or some of its neighbors (where the formal rejection of communist rule has not occurred). Whether a product of good history or of shrewd politics, the parallelist claim that the project of legal-institutional, public law or constitutional reform involves reconnecting with an interrupted tradition of Western (and therefore broadly U.S.-style) legality seems to have been held more widely and asserted more forcefully in the western reaches of the former Soviet Bloc than in much of Central Asia, China, or East and Southeast Asia, where ideas and ideals consistent with American models and U.S. advice on matters of constitutional democracy, citizens' rights, and legal and judicial professionalism appear to have had less of an impact.

Moreover, in CEE countries, more than in much of the NIS, the P.R.C. or other Asian states, U.S.-based émigrés and others with ethnic ties to the recipient states have played a role in ex-

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<sup>285</sup> Cf. *Aspects of Reception of Law*, *supra* note 266 (regarding instrumentalism of borrowing); Mattei, *Intellectual Leadership*, *supra* note 268 (discussing the U.S.'s assumption of intellectual leadership in law as rooted in U.S. preeminence in thinking about law as a method of social organization).



tending constitutional advice. To the extent that these individuals have been relatively effective transmitters, their influence also may reflect the importance of a type of parallelism, for they likely have appeared to be (and very well may have been) relatively “in touch” with the aims of reformers and the traditions of the countries to which they have offered counsel.

Developments in the highly active field of U.S. efforts to encourage economic law reform also point to the importance of parallelism. The relatively limited influence of U.S. models and the modest success of programs offering distinctly U.S.-style models in Central and Eastern Europe and the former Soviet Union arguably have reflected recipient countries’ inheritances of French and German style code-based civil law systems, their traditional and renewed political preferences for social democracy, and their new goal of joining Europe. These differences may have helped to make U.S.-style laws—and much U.S. legal advice—in such fields as the law of corporations, antitrust, and other economic fields seem too tightly bound up with an elaborate structure of common law doctrine and interpretation, too focused on free-market solutions, or simply too different from EU standards (whatever the relative merits of American and Western European approaches might have been in the abstract).<sup>286</sup>

A similar story can be told about problems of poor parallelism with respect to China. The P.R.C. has a broadly civil law-

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<sup>286</sup> See Brietzke, *supra* note 254; Richard M. Buxbaum, *New Owners and Old Managers: Lessons from the Socialist Camp*, 18 DEL. J. CORP. L. 867, 871-72 (1993) (arguing that Rhenish capitalism stressing relationships between financial and corporate sectors is a better fit for post-socialist states with their weak economies than is the “casino capitalism” of the U.S. with its emphasis on the brutal force of markets); Ronald Daniels & Robert Howse, *Reforming the Reform Process: A Critique of Proposals for Privatization in Central and Eastern Europe*, 25 N.Y.U. J. INT’L L. & POL. 27 (1992); Fox, *Toward World Antitrust*, *supra* note 86, at 10-12 (describing U.S. antitrust law as an outlier); Mitsuo Matsushita, *A Japanese View of United States Trade Laws*, 8 NW. J. INT’L L. & BUS. 29, 56-57 (1987) (noting that the United States has trade laws that are out of line with other nations’ in their legislative detail, their emphasis on legal process, and their reliance on judicial enforcement); Waller, *Comparative Competition Law*, *supra* note 184 (addressing whether U.S. antitrust law is an outlier due to its narrow focus on microeconomic theory application over broad goals of economic regulation and policy). For a discussion of the dominance of EU standards in CEE competition law, see Fox, *Toward World Antitrust*, *supra* note 86; Mastalir, *supra* note 163; McDermott, *Competition Counseling to Eastern Europe*, *supra* note 42; Danny E. Reed, *Creating Competitive Markets in Poland & Hungary*, 48 ADMIN. L. REV. 515, 523-24 (1996), and Rodriquez & Coate, *supra* note 163.

style system, rooted in the Franco-German tradition received via Japan and the Soviet Union. Arguably much more than many of their post-Soviet counterparts, and despite the P.R.C.'s recent moves toward more radical economic reform, the Chinese leadership has remained committed to a competition policy that includes a series of market-limiting, state-role-protecting and, in some respects, social-welfarist economic policies, and has sought to protect weak state enterprises or to pursue mergers of troubled state enterprises into larger, competition-threatening conglomerates.<sup>287</sup> To the extent that harmonization with foreign systems has mattered in China (where it has mattered a good deal less than in the Western reaches of the former Soviet Bloc), East Asian civil law systems have been at least as relevant as Anglo-American common law systems (with the notable exception of Hong Kong).<sup>288</sup>

To the considerable extent that reformers in China and the former Soviet world have sought to create antimonopoly laws that pursue broadly U.S.-style antitrust goals of protecting competition, differences in U.S. and CEE/NIS or P.R.C. contexts have been significant issues and again suggest the adverse effect of poor parallelism on the apparent relevance and influence of U.S. models and advice. Specifically, it has been suggested that the reform-era P.R.C.'s quest to *create* elements of a competitive market is so fundamentally different from the *market-preserving* concerns of U.S. antitrust law that the gap may explain why U.S. models and U.S. advice could not have been expected to have much impact in contemporary China.<sup>289</sup> The point applies with equal force to some CEE and NIS countries.

Problems of parallelism also may explain the frustrations encountered by proponents of U.S.-style trade and investment law despite the apparent opportunities for influence inherent in their evident power to help compliant states gain access to American and other Western capital and markets. The widely

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<sup>287</sup> See Fang Liufang, *China's Corporatization Experiment*, 5 DUKE J. COMP. & INT'L L. 149 (1995); Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387 (1995); Henry Zheng, *Business Organizations and Securities Laws of the People's Republic of China*, 43 BUS. LAW. 549 (1988).

<sup>288</sup> See Jacques deLisle, *Political Alchemy, The Long Transition, and Law's Promised Empire: How July 1, 1997 Matters - and Doesn't Matter - in Hong Kong's Return to China*, 18 U. PA. J. INT'L ECON. L. 69 (1997).

<sup>289</sup> See Bing Song, *supra* note 287, at 395-96.

perceived divergences of aims and interests between the designers of foreign investment laws in China and some post-Soviet states, on one side, and U.S. and other foreign investors, on the other, seems necessarily to have cast a cloud of recipient-country suspicion over advice offered by legal assistance programs that have shared the views of U.S. investors. Where designers of some CEE, NIS, and P.R.C. laws have sought to promote capital inflows, foreign exchange earnings, transfers of technology and knowledge, and “laboratories” in which to test ideas for domestic economic reform, many U.S. advisors and exporters of U.S. legal models have been more concerned with encouraging legal regimes in “recipient” or “borrowing” countries that promote the full realization of comparative advantage (which in practice has meant capitalizing on low production costs in many post-Soviet or reforming socialist states), gains from trade (which in practice has meant access to CEE/NIS or P.R.C. domestic markets), protection of intellectual property, and a stable political and legal environment.

On the other hand, U.S. models and advice appear to have attracted greater support and to have had more of an effect in some aspects of economic law where the problem of poor congruence with recipient countries’ aims has been less serious (sometimes because of the impact of U.S. power in shaping the legal options facing post-communist and reforming socialist states). Although there clearly have been limits to influence that may have stemmed from problems of poor parallelism, foreign investment law has been an area of relatively great success for U.S. models and U.S. advice programs. It seems plausible to attribute such success, in part, to the relatively high degree of fit between CEE/NIS and P.R.C. reformers’ goals of gaining access to U.S. and other Western investors, and the U.S. legal models and legal advice that U.S. providers have presented, credibly, as describing a legal regime that would be appealing to those investors. The lack of profound differences between U.S. and international/European regulatory regimes may have helped as well, avoiding one common impediment to perceived or actual parallels between recipient-country aims and U.S. prescriptions.

Similarly, parallelism may explain what some commentators have seen as possible U.S. influence on aspects of China’s company law, Chinese contract law, post-Soviet competition law, P.R.C. and CEE bankruptcy law, and CEE/NIS securities and

exchange laws.<sup>290</sup> Basic features of U.S. legal models—and U.S. legal advice urging their adoption—fit well with the general goals of promoting markets and openness to foreign investment that CEE/NIS and P.R.C. law reformers have embraced. On many of these issues, U.S. law and U.S. advisors' recommendations have paralleled European or international standards (so much so that it sometimes has been difficult to attribute the influence to U.S. as opposed to other foreign sources). This feature could be expected to reinforce recipients' sense of parallelism and means-end fit by suggesting to recipient-country law-designers that they have had few alternative legal means to those presented in U.S. models and advice.

The lesson of the advantages of parallelism also seems to have been appreciated by some U.S. economic law advisors and proponents of the export of U.S. economic law models. When urging the adoption of distinctly U.S.-style laws, they often have asserted a special fit between the proposed means and the potential importer's goals. One example of this may be the claim by U.S. proponents of Sherman Act-like antitrust law that imitation of the European model would lead to inadequate protection of competition, excessive protection of weak competitors, and thus serious compromises in CEE reformers' pursuit of their proclaimed goal of achieving efficient markets. Another example is suggested by the argument that U.S. bankruptcy law has been widely imitated in post-socialist and reforming socialist countries because its approach to reorganization (and its emphasis on reorganization over liquidation) has offered a superior method for addressing the

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<sup>290</sup> Possibly U.S.-influenced elements of Chinese company law includes the principles of limited liability, shareholders' rights, and duties of directors. Elements of Chinese contract law paralleling U.S. norms include a contract's essential elements, damages, and dispute resolutions. In post-Soviet competition law, most accounts find only a partial emulation, but a few less plausible accounts find extensive emulation, including adoption of economic efficiency as the standard for anti-competitive behavior. Accounts of post-communist bankruptcy and securities and exchange law point to some basic provisions that parallel U.S. models. See generally Robert C. Art & Minkang Gu, *China Incorporated: The First Corporation Law of the P.R.C.*, 20 YALE J. INT'L L. 273 (1995); Bufford, *supra* note 53 (regarding bankruptcy); Burke, *supra* note 177 (regarding the Reformation of NIS Legal Systems); Chang, *supra* note 118 (regarding Chinese bankruptcy); Celia R. Taylor, *Capital Market Development in the Emerging Markets: Time to Teach an Old Dog some New Tricks*, 45 AM. J. COMP. L. 71 (1997) (regarding CEE/NIS securities).

problems of privatization or restructuring of debt-ridden state enterprises that reformist leaders have sought to tackle.<sup>291</sup>

The relatively high level of recipient-country interest and acceptance apparently enjoyed by U.S. assistance programs and U.S. models that have addressed narrowly technical issues of economic regulation also seem to indicate the advantages of small gaps or minimal obvious conflicts between U.S. advice and examples, on one side, and the inherited legal principles and practices or the legal reform agendas of recipients and potential borrowers, on the other. Parallelism, of a sort, seems to capture some important reasons for the apparent success of technical assistance projects ranging from the CLDP's project finance workshops, to the U.S. PTO advice to Chinese authorities on how to improve intellectual property protection, to U.S. counsel to the Ukrainian anti-monopoly agency concerning methods of competition regulation and the advantages of conjoining prosecutorial, adjudication, and rule-making authority in a single organ. Precisely because such advice often seems to have had an especially strong aura of scientific or social-scientific truth, there has been less occasion to question the advice's compatibility with the existing system or its suitability as a legal means to already-accepted reformist policy ends.

Moreover, such "technical" legal assistance often has been provided through direct contacts between specialist lawyers on both sides. Their shared specialist legal cultures— of foreign trade and investment law, insolvency law, competition law, patent law, securities law, and the like— very well may have rendered manageable gaps between U.S. and recipient-country legal cultures and legal systems that would have proved unbridgeable in the context of legal advice or models addressing more general matters. In less formal contexts, a variation of the same phenomenon likely has emerged in many interactions among U.S. and CEE/NIS or P.R.C. and other Asian business lawyers when they have worked to structure and negotiate trade and investment agreements and to develop legal forms that are acceptable to clients from different systems. In addition to the common ground provided by their engagement in the same substantive legal specialties, the joint purposes of getting the present deal done and of

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<sup>291</sup> See Bufford, *supra* note 53 (regarding bankruptcy law); Lagenfeld & Blitzer, *supra* note 165 (regarding competition law); Waller, *Comparative Competition Law*, *supra* note 184.

increasing the prospects for additional deals may have contributed to a very concrete (if highly discrete and, arguably, narrowly parochial) sense of parallel purposes that has enhanced the opportunities for transmitting U.S. legal ideas and models.

Cross-regional differences in the impact of U.S. advice and models in fields of economic law also seem to bear out the advantages of "parallelism." In China, as in some of the less Westernized parts of the former Soviet world, specific and especially serious problems of ill-fit between local legal traditions and goals and U.S. models and advice may have exacerbated the commonplace problems of poor parallelism that have stemmed from civil law traditions and a desire for compatibility with nearer neighbors' regimes of economic law. The comparatively unimpressive record of U.S. economic law advice and models in such countries may reflect these legal systems' lingering legacy of socialist and authoritarian law which, with respect to such basic economic issues as property, freedom of contract, and agency, has been much more remote from—and hostile toward—U.S.-style common law models than the civilian tradition generally has been.

Specific questions of economic law and regulation in the P.R.C. and CEE/NIS region provide some suggestive, concrete illustrations. For example, the nations in the former Soviet Bloc which have gone especially far down the path of successful privatization and the creation of functioning markets also have been among the most likely to adopt U.S.-style economic efficiency principles and U.S.-style enforcement mechanisms in their competition law.<sup>292</sup> In such cases, parallelism between what host-country conditions and reformers' immediate aims seem to demand, and what U.S.-style solutions purport to supply, has been relatively high. In contrast, some of the purposes that (at least prior to recent changes) have been attributed to China's company law and securities regulations (such as imposing a modicum of market discipline while retaining majority state ownership and control of major companies, or keeping state enterprises afloat by bringing vast private savings into the state-controlled sector) suggest a lack of congruence with the concerns of U.S. corporate and

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<sup>292</sup> See Kovacic, *Competition Policy Entrepreneur*, *supra* note 2; Mastalir, *supra* note 163; Reed, *supra* note 286; Rodriguez & Coate, *supra* note 163.

capital markets law.<sup>293</sup> The existence of such serious gaps would suggest that U.S. models and advice would fit especially badly with official Chinese aims, and that could explain (on parallelism grounds) the relatively limited influence of U.S. ideas and ideals in these areas. In some parts of the NIS, a similar story is quite plausible. But in some of those states, including Russia, a different sort of a lack of parallelism also may account for the meager impact of U.S. models and advice in such fields as securities law, competition law, and company law. Chaotic economic and institutional environments and deep popular resentment against apparently corrupt and unfair modes of privatization likely have made U.S. prescriptions seem relatively irrelevant in theory, as well as unimplementable in practice.<sup>294</sup>

In these varied ways, the idea of parallelism—like the notions of power, prestige, and politicization—captures some of the recurring patterns in what substantive legal advice has fared well and fared badly, and in what models of substantive U.S. law have proved attractive and off-putting in the recent experience of the American legal encounter with the former USSR, the P.R.C., and neighboring regions. Like the four “process” lessons, these four “substantive” lessons cannot be simply strung together to provide an answer to what has worked best, or might work well, in U.S. efforts to promote economic markets, democracy, and the rule of law through fostering legal reforms in the CEE/NIS region, China, and other nations in transition.

### 3.3. *The Limits of Lessons and the Lesson that Laws are Not Enough*

The relationships among the foregoing lessons about “process” and “substance” in U.S. legal export and assistance efforts are complex. In some respects, most of the lessons seem fairly complementary, even overlapping. Long-term, responsive, and collaborative programs seem likely to require, or over time to generate, local knowledge and a tendency to avoid parochially American prescriptions. Legal assistance or export efforts that focus on substantive fields in which U.S. models enjoy high pres-

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<sup>293</sup> See Matthew D. Bersani, *Privatization and the Creation of Stock Companies in China*, 1993 COLUM. BUS. L. REV. 301, 309 (1993) (discussing the “soak up capital” argument).

<sup>294</sup> See Stephen Holmes, *What Russia Teaches Us Now*, 33 THE AMERICAN PROSPECT July-Aug. 1997, 30-39.

tige, or that provide seemingly "apolitical" prescriptions seem, other things being equal, unlikely to face problems of poor parallelism with recipient states' legal traditions and institutions, or local law reformers' aims. Where U.S. examples or U.S. advisors' prescriptions do not depart radically from the key features of the host country's extant legal system or from the contours of an indigenous consensus for legal change, the advice or models are unlikely to appear political. To the extent that prestige rests in part on perceptions of efficacy or global importance, those aspects of U.S. legal advice or U.S. legal models that are strongly backed by U.S. power (especially of the passive or structural rather than politically wielded and discretionary type) are likely to score relatively high on "prestige."

Where the substantive content of U.S. advice or U.S. models has the advantages of power, prestige, non-politicization, and parallelism, such prescriptions seem more likely to be followed and such models emulated when the project of transmitting advice or models is in the hands of well-established and well-supported programs that enjoy extensive and developed channels of communication and cooperation with recipient country institutions and individuals, that have staff who are skilled in local languages and knowledgeable about local law, politics, and culture, and that are adept at packaging U.S. advice and models in neutral or general terms. U.S. legal assistance programs and channels for transmitting U.S. legal models that have these "process" strengths seem likely to be most effective where the substance of what they convey enjoys the advantages of support from U.S. "power," prestige in the eyes of relevant actors in the recipient country, insulation from political suspicion and backlash, and a high degree of fit with practices and preferences in the recipient country.

In other respects, however, the lessons seem to define alternative paths to "success." Some lessons suggest substitute "virtues" that can be relied upon where the requisites of another lesson cannot be satisfied. In some cases and contexts, the dictates or predictions of one lesson can seem incompatible with those of another. Bringing in advisors and assistance-providers with local knowledge may be a substitute for a program's long-term cultivation of relationships with local lawyers or leaders. Stressing general or universal principles may be an alternative to crafting advice uniquely suited to a recipient country's circumstances



(whether through providers' careful development and use of expertise about local conditions and traditions, or through programs' collaboration with indigenous groups and responsiveness to their requests and suggestions). The presence of parallelism or prestige effects may make otherwise overly political prescriptions into something palatable and feasible, even in the absence of effective U.S. power. Sometimes power alone may be enough, and thus may stand as an alternative to prestige, parallelism, or a seemingly apolitical agenda. Indeed, the very resort to "power" may make the prescriptions seem more "political." The "prestige" of some U.S. models seems to be in part a matter of their perceived uniqueness. And that quality frequently will be at odds with the notion, central to one important aspect of the "parallelism" lesson, that U.S. advice fares better when it focuses on areas characterized by minimal (or at least bridgeable) gaps between U.S. prescriptions and existing legal systems.

The presence of U.S. power to push for the acceptance of U.S. prescriptions or the imitation of U.S. exemplars, the prestige of U.S. models, the seemingly apolitical content of U.S. examples or advice, or the fit between those examples or advice and recipients' existing legal systems or reformist goals seem to offer "substantive" means to make up for a lack of ability or willingness to adhere to "process" lessons. Conversely, strong institutional and personal ties, deep understanding of recipient country needs, habits and attitudes, and great skill in casting advice or prescriptions in appealingly general, universal, or seemingly appropriate terms are "procedural" assets that might make it possible to market substantive prescriptions or models that initially seem politically charged or ill-fitting, that enjoy little prestige among relevant groups in recipient countries, or that draw only modest force from the backing of the U.S. government or internationally engaged U.S. business interests or from more subtle pressure to conform to U.S. standards as a condition of access to the U.S. economy or to U.S. government-controlled benefits.

Indeed, some of the most "prestigious" U.S. ideals, such as the independent role of lawyers, the state-constraining powers of courts, and the centrality of rights, and some of the prescriptions most strongly backed by U.S. power, such as those concerning trade and investment relations with the U.S., seem to have been transmitted effectively through processes that have paid little heed to preexisting systems and values, that have done little to make

the advice or models seem "apolitical" or not distinctly "American," that have removed participants from their home environments (thereby leaving little scope for sustained collaboration with local organizations and groups) and that have been of strikingly short duration. On the other hand, relatively successful collaborative, local knowledge-informed programs have tended toward advice that has appeared apolitical and that has paralleled recipient country traditions and moderately reformist aspirations. That approach, which has been pursued with reported success by Ford Foundation and Soros-supported programs, among others, seems to have entailed foregoing or disdaining reliance on the power and prestige of some distinctly American models, eschewing advice cast in the form of some arguably "general" or universal principles, and missing some promising, if potentially controversial, opportunities to support bold prescriptions that might have resonated with the goals of radical law reformers in some recipient countries.

In light of these complicated relationships among the "lessons" taught by the recent experience of U.S. legal assistance programs and efforts to export U.S. legal models, the prescriptive implications of these lessons, taken together, are not susceptible to simple generalization. Which lessons apply most forcefully and whether other lessons are complementary or contradictory is likely to depend on the specific circumstances of a particular recipient country, advice-providing program, substantive legal field, or on a host of other forces and conditions.

The recent career of U.S. efforts to provide legal assistance to the NIS and CEE countries and to the P.R.C. and its neighbors, and recent experience with exporting U.S. legal ideas and ideals to those regions also collectively point to a final, overarching lesson: laws are not enough. Securing the acceptance of legal rules or formal legal structures that follow U.S. programs' advice, imitate U.S. models, or meet the U.S. government's or U.S. investors' demands has not been sufficient to assure significant and durable legal change in the P.R.C., NIS, and CEE states. Formally adopted laws that have tracked U.S. advice or U.S. models have faced such serious problems of poor implementation and extensive adaptation that it seems clear that programs targeting only such changes risk being wholly ineffective. The specific, recipient-country causes of the problems have been many, including: a lack of sincere commitment to putting into practice laws that

have been conceived as a grudgingly purchased ticket for admission to the international legal and political order or international "respectability" more generally; weaknesses in the legal, political, and economic infrastructures necessary to make specific legal rules practically viable; and political-cultural environments and policy contexts that have been either hostile to American-style (or broader Western-style) laws or legality, or have produced very exotic interpretations and glosses on the legal rules and concepts that U.S. and other advice-providers and model-exporters have sought to convey.

A narrow focus on positive laws and formal institutions, and a resulting failure to take into account the strength or weakness of underlying institutional and attitudinal features thus can produce serious errors in assessing the impact and prospects of U.S. assistance efforts and "exported" U.S. legal ideals, and in discerning the lessons that recent experience teaches.

The evident implication for U.S. legal advice-providers and aspiring exporters of U.S. legal models is that they should consider working to foster the development of a favorable framework of host-country legal-institutional and government-institutional norms and practices, and broader attitudes toward law and the rule of law. The project of promoting these underpinnings for effective legal change, however, takes much time and effort, produces results that are, at best, hard to measure, and appears to promise only uncertain and long-term pay-offs. Helping to prepare legislation, offering advice on formal legal and law-making processes, and holding seminars on some specific fields of U.S. law have offered the prospect of more immediate and more measurable "results." Especially for the many advice projects and programs that have depended on funds from federal government or some foundation sources, mounting pressures to produce short-term, demonstrable and, ideally, quantifiable outcomes has reinforced the appeal of this approach. For other providers, there may have been a sense that formal rule-focused reforms would be enough to secure real change, or that the comparative advantage of U.S. advice programs and purveyors of U.S. examples has lain in such areas (and not in trying to affect underlying institutions and attitudes directly). For any or all of these reasons, the course of action seemingly demanded by the lesson that "laws are not enough" has not been overwhelmingly popular among U.S. advisors and model-mongers.

Nonetheless, an appreciation of the lesson that such work is essential has been evident in endeavors of many private and public sector U.S. programs. Examples include: efforts to develop professional competence, transmit technical skills, and instill attitudes of autonomy among judges, lawyers, legal academics, regulators, legislators, legislation-drafters, and legislative staffs in China, the former Soviet Union, and its environs; assistance to emerging non-governmental organizations with law-related and "rule of law"-supporting agendas in the former Soviet world; support for CEE/NIS and P.R.C. universities to develop teaching and research programs for Chinese and post-Soviet students and scholars to study and work in the U.S., and for publishing projects to disseminate American and other legal ideas in the CEE/NIS and P.R.C. regions. Efforts of this sort appear to have been on the rise, and programs that have not explicitly pursued such institutional or attitudinal agendas may nonetheless prove to have penumbral effects that can advance those ends indirectly and over the long term.<sup>295</sup>

However much or little U.S. advisors and exporters of U.S. models have acted in accordance with the lesson that laws are not enough, some prominent observers and participants have endorsed this lesson explicitly. For example, Jeffrey Sachs, an influential economist and long-time consultant who for many years has advised thoroughgoing market reforms for former Soviet Bloc states, has argued that Russia today needs lawyers more than it needs economists.<sup>296</sup> Similarly, Patricia Wald, a U.S. federal appellate judge and frequent participant in exchanges with CEE countries, has declared that building the rule of law (and an independent judiciary to support it) in the nations of the region requires institution-building more than legislation-drafting.<sup>297</sup> More generally, in addressing and assessing economic law reform,

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<sup>295</sup> See generally, CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE, *supra* note 15; QUIGLEY, *supra* note 31 (suggesting relative growth of efforts targeting "institutional" and "civil society" issues); Newberg & Carothers, *supra* note 271. Some U.S. academics' concern, that the State Department's rule of law initiative for China has imperiled a number of promising decentralized initiatives that had been developing with some U.S. inputs, suggests worries about reversal of recent trends toward cultivating diffuse institutional/attitudinal forms in U.S. legal advice and assistance efforts in China.

<sup>296</sup> See Jenik Radon, *Permitted Unless Prohibited: The Changed Soviet Mentality*, 20 *FORDHAM INT'L L. J.* 365, 366 (1996).

<sup>297</sup> See Symposium, *supra* note 1, at 130-36.

commentators have argued that U.S. assistance programs and aspiring exporters of U.S. legal models would be well-advised to work on strengthening public institutions and creating appropriate levers for government regulation of the economy in recipient countries because such measures are more essential (as well as more politically acceptable to recipients and ultimately more effective) than pursuing an agenda that seeks to enact the “best” or the “right” specific laws or for a market economy.<sup>298</sup> Similarly, commentaries addressing legal reforms to support democratization have concluded that U.S. efforts have been most effective when they have gone beyond a focus on electoral laws or constitutions to emphasize the cultivation and consolidation of effectively functioning judicial institutions, parliaments, and democracy-supporting elements in civil society.<sup>299</sup>

Certainly, participants and observers have leveled harsh criticisms at programs that appear to have rejected the lesson that laws are not enough. In one typical example, an experienced participant in U.S. programs to provide competition law assistance attacked donors’ preferences for short-term, measurable outputs such as draft laws or numbers of sessions held to provide technical advice on implementation.<sup>300</sup> The same commentator criticized the aid-funders’ lack of interest in the difficult and indispensable work of building institutions, training their staffs, and instilling protocols and rules of regulatory and bureaucratic behavior—the matters on which the implementation of “good” laws would depend.<sup>301</sup> In much the same spirit, some of the most prominent commentators on U.S. democracy assistance programs have condemned a “checklist” approach that has measured the success or failure of democratization in terms of formal (and distinctly U.S. model-based) legal criteria such as a democratic constitution and democratic electoral laws.<sup>302</sup>

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<sup>298</sup> See, e.g., Daniels & Howse, *supra* note 286, at 30; Kovacic, *Competition Policy Entrepreneur*, *supra* note 2, at 445-51 (discussing foci of donor programs).

<sup>299</sup> See Thomas Carothers, *Recent U.S. Experience with Democracy Promotion*, 26 IDS BULLETIN 62, 67-68 (1995).

<sup>300</sup> See William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies*, 44 DEPAUL L. REV. 1197, 1218-19 (1995).

<sup>301</sup> See Kovacic, *Competition Policy Entrepreneur*, *supra* note 2, at 445-46.

<sup>302</sup> See CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE, *supra* note 15. See also Newberg & Carothers, *supra* note 271. The “checklist” that these sources criticize includes other factors as well, including some that speak more

Such charges of short-sightedness, impatience, parochialism, and insufficient attention to institutional and ideological infrastructure are not new criticisms of U.S. efforts to provide legal assistance or to export U.S. legal models abroad. Broad failure to follow the lesson that "laws are not enough," like widespread disregard for the several other lessons about "substance" and "process" taught by the recent experience of legal aid and legal export to the former Soviet world and to the P.R.C. and its neighbors, has been a principal count in contemporary indictments of such efforts as either ineffective or immoral or both. These complaints also recall the charges leveled at analogous undertakings from an earlier time. The "law and development" projects of the 1960s and 1970s— which involved some of the same U.S. government agencies, foundations, and experts but which targeted primarily Latin America, Africa, and parts of Asia other than China— drew broadly similar condemnations.

To be sure, much has changed during the intervening twenty to thirty years. The principal targets of efforts to provide U.S. legal assistance and to export U.S. legal models are different. The broader American and recipient-country goals and international conditions that have defined the contexts for such "law reform" or "legal development" undertakings have been transformed as well, from those of promoting national economic development in poor countries and preventing the spread of communism, to those of securing global free-market capitalism and fostering liberal democracy. It is still too soon to judge whether the contemporary enterprise of providing U.S. legal assistance and promoting the export of U.S. legal ideas and ideals will enjoy, on the whole, more favorable positive or normative assessments than those which dogged the efforts of the "law and development" era. Whether it does will depend, in part, on how much the change in context has mattered and on how well participants have learned the lessons taught by recent experience, and foreshadowed in the experiences of the previous great wave of U.S. legal assistance programs and efforts to disseminate U.S. legal models.

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to the problems of effectively functioning institutions and a vibrant civil society, but the checklist approach saw the formal constitutional and electoral law arrangements as indispensable first steps. *See id.*